Supreme Court of the United States

OCTOBER TERM 1953 — No. 69.

DR. EDWARD K. BARSKY,

Appellant,

—against—

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANT.

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DR. EDWARD K. BARSKY,
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—*vs.*—
THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

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Opinions Below.

The majority and dissenting opinions in the Court of Appeals of the State of New York appear at R. 64 and are reported in 305 N. Y. 89.

The opinion of the Appellate Division of the State of New York appears at R. 62 and is reported in 279 App. Div. 1117. Said opinion states it was based upon the authority of a prior decision of the same Appellate Division in a cause that subsequently became a companion cause; that prior decision is reported in 279 App. Div. 447.

The report and opinion of the Regents' Committee on Discipline appears at R. 36.

The report and opinion of the Sub-Committee of the Regents' Committee on Grievances appears at R. 30.

Jurisdiction.

The jurisdiction of this Court is conferred by Section 1257(2) of Title 28 of the United States Code.

The judgment of the Court of Appeals of the State of New York was entered February 26, 1953. Application for reargument was made March 5, 1953 and denied April 16, 1953, at which time the Court of Appeals granted Appellant a stay pending this appeal. Application for appeal to this Court was made May 7, 1953. This Court noted probable jurisdiction October 12, 1953.

The Statutes Involved.

N. Y. Education Law, Section 6514(2b) authorizes the revocation or suspension of a physician's medical license upon his conviction "in a court of competent jurisdiction, either within or without this state, of a crime." Section 6515 sets forth the procedure in disciplinary proceedings.

The statutes are set forth in the Appendix.

Statement of the Case.*

Appellant is a physician and surgeon of some thirty years of the highest standing in his profession and in his community. On September 28, 1951, the Appellee (hereafter referred to as the Regents) suspended Appellant's medical license for six months by reason of his conviction in 1947 in the U. S. District Court, District of Columbia, for failure to produce before the House Un-American Activities Committee, subpoenaed records of a charitable relief organization known as the Joint Anti-Fascist Refugee Committee, of which Appellant occupied the unsalaried post of chairman.

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* The designation "S.M. p." refers to the pages of the typewritten stenographic minutes of the hearing held before the Regents' Sub-Committee of the Medical Committee on Grievances. By stipulation, printing of these minutes was dispensed with; they were handed up to this Court together with all exhibits introduced at the hearing, the same procedure as in the Court of Appeals.

Appellant and other members of the executive board of the organization, among whom were a number of physicians, were indicted on two counts: one for conspiracy to fail to produce the records, and the other for failure to produce them. On the trial, the then attorneys for Appellant and the others indicted, delimited themselves to the constitutional issues involved and to the defense of lack of custody or control. As the dissenting opinion in the Court of Appeals noted:

> "The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6515, subd. 4; Sec. 6517). It summarized 'the issues litigated and not litigated at the criminal trial' in this way: 'There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient.' The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment." (R. 70)

Appellant was acquitted of conspiracy not to produce the books. Yet he was convicted of failure to produce the books of which admittedly he did not have possession, of which the Attorney General of New York acknowledged that the executive secretary (and not Appellant) "was the legal custodian" (S.M. p. 370), and of which the executive secretary who did have possession was also later convicted.

Appellant's conviction was affirmed, one Judge dissenting (*Barsky, et al.* v. *U. S.* 167 F. 2d 241); certiorari was denied in June 1948 (334 U. S. 843), and rehearing was denied two

years later with a notation that two of the Justices were of the opinion that the petition should be granted (339 U. S. 971).

Appellant was sentenced to six months. He actually served five months in prison, thus suffering at the same time an actual suspension of his medical license for those five months.

Following Appellant's conviction, the Regents commenced proceedings against Appellant in 1948 to revoke his medical license under Sections 6514 and 6515 of the New York State Education Law, on the ground that he had been convicted of a crime (R. 1). Appellant interposed an answer in which he detailed claimed violations of the Federal Constitution and set forth defenses on the merits (R. 3).

On the hearing before the Regents' Sub-Committee of the Medical Committee on Grievances, Appellant offered evidence on the merits to show that although he had been found guilty on the narrowly limited criminal trial, he was not actually guilty, and that no moral turpitude was involved. The Regents' Committee on Discipline in reviewing the matter, later stated: "* * * Respondent's motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here" (R. 53).

This was the admittedly uncontradicted evidence adduced by Appellant. In 1942 the Joint Anti-Fascist Refugee Committee was formed to aid some 500,000 refugees who fled from Spain following the Franco victory. Documentary evidence including photographs introduced at the hearing, show these men, women and children were homeless, ill, and undernourished; some were without arms or legs, some were blind, and some had to be carried over the Pyrenees into France. Dr. Joy, Director of the Unitarian Service Committee which distributed the funds for this Joint Anti-Fascist Refugee Committee in France, testified that "of the Spanish Republican refugees concerned, only a small proportion were Communists" (R. 57).

The organization raised over a million dollars from 1942 to 1947, besides clothing and similar relief in kind. As the Regents' Committee on Discipline reported: "* * * the official position of the United States was then anti-Franco" (R. 58).

The organization distributed this money and relief to other organizations like the Quakers, the Unitarians, the Christian Board of Missions, and the Committee in Mexico, all of whom handled the actual disbursing of the funds and relief, and all of whom used the money to build and maintain hospitals in France and Mexico, a convalescent home, a rest home for tubercular and undernourished children, and to provide medical aid, food, clothing and shelter. Photographs of the hospitals, homes and inmates, are in the record. The Regents' Committee on Discipline found: "* * * there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion" (R. 57).

The organization had a paid, executive secretary who was acknowledged by the Attorney General of New York in the hearing before the Regents' Sub-Committee of the Medical Committee on Grievances, to be "the legal custodian" of its books (S.M. p. 370). Appellant served as chairman without remuneration and within the limited time his active practice permitted (S.M. p. 222).

The organization was concededly licensed by and rendered reports to the President's War Relief Control Board. It received complete tax exemption as a charitable organization from the Treasury Department. The money it sent the Quakers for relief in Africa, for example, was cleared through and approved by the State Department and the Federal Reserve Bank. Some of the relief obtained by the organization was distributed in conjunction with the United Nations Relief and Rehabilitation Association. Its relief was recognized by the French Government. In some cases it was called upon for aid by the U. S. State Department. Newspapers like the New York Times and the Herald Tribune carried

editorials praising the organization and requesting funds for it (S.M. p. 296). Eminent persons from all walks of life and all professions supported its efforts (S.M. pp. 220-1, 280, 297-8).

The Attorney General of New York conceded that at the time "the various governments throughout the world had ceased relations with the Franco regime" (S.M. p. 219).

On about December 1, 1945, the House Un-American Activities Committee, without any notice to the organization, attempted to have the War Relief Control Board revoke the organization's license. The request was refused. The House Committee then served a subpoena upon the executive secretary for the production of records including the names of the contributors to and the recipients of the charity of the organization. It served a similar subpoena upon Appellant although he did not have such custody. The executive board voted to refuse to turn over its books to Appellant. One of its reasons was that the secretary, who had possession, had already been served.

The organization and Appellant were then faced with a problem of trust and confidence; having been entrusted with these names, they were fearful that revealing them would cause financial and other harm to the contributors, and would cause imprisonment and execution of those families of the contributors and recipients who were still in Spain. That their fears were reasonable was borne out later by the fact that even before the aforementioned indictments, testimony given by one of the board members of the organization before the House Committee, found its way to a newspaper in Spain (S.M. p. 240; Ex. HH). Appellant testified without contradiction, that had the names of the contributors and recipients been included in that testimony, their families in Spain would have been imprisoned and executed (S.M. pp. 237, 239).

The Regents' Committee on Discipline reported:

"The Attorney-General formally conceded that Respondent 'was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them'; that the opinion on the constitutional question held by Respondent's counsel 'was held by many lawyers and some jurists'; that there were 'expressions in some legal journals' that the subpoenas were illegal; and that such an opinion was held by one of the judges of the Court of Appeals before which the case came up on appeal. Later the Attorney-General stated:

"'I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part; and again:

"'I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable.'

"Second, as bearing on the motives of Respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney-General made the following concession:

"'* * * I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the conduct of the House Committee on Un-American Activities at the time.'

"The Attorney-General conceded further that Congressmen were included among the 'people of prominence' who held such views, and that there were Con-

gressmen who at that time made speeches 'against the activities of (the Congressional Committee) against its procedure and otherwise.'

"The principal reasons given by Respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country whose purpose is in part to conduct activities abroad,' and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945, asked the President's War Relief Control Board to cancel the

Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. . Finally, they asserted they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might, if necessary be determined by the courts.

"If these views were honestly held and these assertions honestly made they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (Sinclair v. United States, supra). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record, discloses no such basis.

"A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But there is no such evidentiary showing. It may be that some of those connected with the Refugee Committee, perhaps Respondent among them, had Communist affiliations, and it may be that through them the Refugee Committee was led into some unspecified subversive activity; but there is no legal evidence to support these hy-

potheses and conjecture cannot take the place of evidence.

* * * * *

"There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. Dr. Joy testified also that, of the Spanish Republican refugees concerned, only a small proportion were Communists. There is evidence also in Respondent's ExhibitD, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board did, in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.

"There is ground also for conjecture, favorable to Respondent's position, as to how the situation eventuating in the criminal trial may have arisen. It appears from testimony in the criminal trial by Congressman Wood, Chairman of the Congressional Committee, that the Congressional Committee had received complaints about the Refugee Committee, most of which 'simply complained that they engaged in political propaganda.' Since the Refugee Committee was engaged in raising money for the relief of Spanish Republicans, it is natural that some of its literature, and some of the speeches at meetings and on street corners,

> should have been anti-Franco and pro-Spanish-Republican; * * *. It may well be that this might have been thought to be a violation of the condition of the Refugee Committee's license from the President's War Relief Control Board that it should engage solely in relief and not in political action or propaganda; * * * the Refugee Committee's license was not revoked. But assuming that such literature and statements are to be considered propaganda (rather than an incident of fund-raising), there is no showing that it was un-American or subversive propaganda, since the official position of the United States was then anti-Franco." (R. 53)

As a sample of the opinion of the time, the record contains this excerpt from 14 Chicago Law Review 256, 261:

> "Few subpoenas have ever been so broad as the one recently issued by the House Committee against the Joint Anti-Fascist Refugee Committee. The courts have always found some restriction as to time and subject matter. Here there is none. It should occasion little surprise then if the subpoena issued by the House Un-American Activities Committee were to be declared invalid." (S.M. p. 309)

The article concluded that:

> "The investigating activities of the House Committee on Un-American Activities rest upon rather insecure constitutional foundation."

The record also contains an excerpt from 60 Harvard Law Review 1193, 1234, concluding that:

> "Nothing in recent years has been as un-American as the conduct of the hearings of the Congressional Committees on un-Americanism." (S.M. p. 313)

Similar sentiment was expressed in 43 Illinois Law Review 253; 22 Southern California Law Review 464; 33 Cornell Law Quarterly 565.

Appellant testified that this was a "test case," this was the first time the issue had arisen as to whether the activities of the House Committee were constitutional (S.M. pp. 235, 308). An article in 47 Columbia Law Review 416, agreed that: "The questions posed by the operations of the Committee on Un-American Activities have never been judicially answered."

The uncontradicted testimony indicates beyond doubt that Appellant had compelling moral and legal reasons for his position.

Appellant answered all questions asked of him by the House Committee. However, because the executive secretary who had the books, did not produce them, Appellant and the others, as well as the executive secretary, were indicted and convicted as mentioned.

On April 25, 1951, the Regents' Sub-Committee of the Medical Committee on Grievances, which first heard the matter, recommended that Appellant's license be suspended for three months.

The Attorney General of New York had adduced testimony over objection that the organization had been placed on a list by U. S. Attorney General Tom C. Clark (only subsequent to Appellant's conviction), and that dismissal of the complaint of the organization against the U. S. Attorney General in connection with that listing, had, at the time, been affirmed by the U. S. Court of Appeals (S.M. p. 399). The Sub-Committee of the Medical Committee on Grievances plainly made that listing a prime if not the sole basis of its decision (R. 33).

On April 25, 1951 the entire Medical Grievance Committee, which did not hear any of the testimony, recommended, by a vote of six to four, to increase the length of the suspension to six months.

Subsequently, this Court reversed the decision of the U. S. Court of Appeals and upheld the complaint of the organization in connection with the listing (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123).

On July 31, 1951, the Regents' Committee on Discipline, which heard and reviewed the matter, wrote a carefully detailed report (R. 36) in which doubt was expressed as to the jurisdiction of the Regents and in which it stated it was taking jurisdiction to enable the courts to pass upon the matter (R. 47). That Committee further found that there was no contradiction whatsoever as to the motives or any of the other testimony involved, and that Appellant had adopted "the traditional method" of testing the constitutionality of the House Committee's course, citing *Sinclair* v. *U. S.*, 279 U. S. 263, 299 (R. 55-56).

The Committee concluded:

> "We disagree with the Attorney-General's position, * * * reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts, that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced.
>
> "Since violation of the Federal Statute which Respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of Respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that Respondent's license be not suspended as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded." (R. 59)

Despite the fact that the Committee on Discipline called the Regents' attention to the mentioned reversal by this Court in connection with the listing, subsequent to the decision by the Medical Committee on Grievances (R. 56), the Regents disregarded the report and recommendation of their own Committee on Discipline, they disregarded the reversal by this Court in connection with the listing, and on September 8, 1951 they voted to accept the determination and recommendation of the Medical Committee on Grievances and confirmed the imposition of a six months' suspension without hearing any witnesses or stating any reasons or grounds (R. 59). The organization was first placed upon the U. S. Attorney General's list some eight months after Appellant's indictment and four months after his conviction. As the dissenting opinion of Judge Fuld pointed out:

> "The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances made, it must be remarked, on a record less complete than the one before the Committee on Discipline. While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some signficance, that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that 'Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States.' Reliance upon that fact was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123.)" (R. 77)

Appellant then instituted a proceeding to review the determination of the Regents, in the Supreme Court of the State of New York, Albany County. The matter was transferred on November 8, 1951 to the Appellate Division of the Supreme Court, Third Department, which in this case was the court of first instance. Prior to argument, the court heard argument in the cases of Dr. Auslander and Dr. Miller, two other physicians who were members of the executive board of the organization and who had also been convicted in the Federal Court in the District of Columbia. The court affirmed the determination in this case of Dr. Barsky, on the basis of its opinion in the prior case of Dr. Auslander and Dr. Miller, and then granted leave to appeal (279 App. Div. 1122), on the ground that a question of law was involved which should be passed on by the Court of Appeals. On February 26, 1953 the Court of Appeals affirmed the determination in all three cases. The majority opinion was written by Judge Desmond. The dissenting opinion was written by Judge Fuld.

By stipulation and order of the Court of Appeals, the final disposition of the cases of Dr. Auslander and Dr. Miller are being held in abeyance pending the outcome of this appeal.

Specification of Errors.

The respects in which the Court of Appeals of the State of New York erred are set forth in the assignment of errors (R. 84). The specifications in substance charge that the Court erred:

(1) In holding that Appellant was not deprived of due process by a construction of the undefined word "crime" in Section 6514(2b) of the N. Y. Education Law so unlimited in scope and so vague, that the medical licenses of Appellant and all New York physicians are subject to suspension or revocation upon conviction "anywhere" in the world of any act that is deemed an offense there but that is not an offense or may be "even meritorious" in New York.

(2) In holding that the statutes involved do not violate due process and the constitutional guarantee against double punishment despite the addition of a suspension of Appellant's medical license to the jail sentence Appellant has already served, for an act that admittedly involves neither moral turpitude nor intellectual unfitness, that is not related to the practice of medicine, that is not an offense in New York, and that is the traditional method of testing the constitutionality of legislative acts.

(3) In holding that Appellant was not deprived of due process and a fair hearing despite the conceded "gross and prejudicial error" in the admission in evidence of and the predicating of a finding by the Regents on, the listing of the organization by the U. S. Attorney General, further despite the admission in evidence of a judicial dismissal of the organization's complaint against the listing, and still further despite the disregard by the Regents of the subsequent reversal by this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

(4) In holding that the sections did not deprive Appellant of due process despite the conflicting and unreasonable constructions thereof whereby the licenses of New York physicians are not subject to suspension or revocation on conviction of a felony outside of New York that is not a felony in New York even though it involves moral turpitude, but whereby those licenses are subject to suspension or revocation under the same section on conviction outside of New York of the lesser offense of a misdemeanor that does not involve moral turpitude and that is no offense in New York.

(5) In holding that the sections do not violate the constitutional precept against legislative abdication even though the only "standards" to guide the Regents in selecting offenses which the Regents may discipline, are "the good sense and judgment of our Board of Regents."

(6) In holding that the statutes do not violate the constitutional precept against legislative abdication despite the fact that they leave the measure of punishment to be imposed upon Appellant and all New York physicians convicted of any offense anywhere in the world, solely to the "good sense and judgment" of the Regents without standards correlating the measure of punishment with the type of offense and without the right of judicial review.

(7) In holding that the hearing mentioned in the sections is limited to a hearing before a sentencing judge, solely for purposes of the measure of punishment and not as to the physician's actual guilt or innocence, and that this did not deprive Appellant of a genuine and judicial hearing and of due process.

(8) In failing to hold that the statutes as construed and applied disregard the constitutional precept that a State cannot impose a domestic penalty for acts occurring in the District of Columbia where the United States has sole power of legislation and exclusive jurisdiction, especially in the absence of substantial relationship between the act and the need for protection of the citizenry of New York.

(9) In refusing to hold that the sections as applied disregard a law of the United States, Title 18 U. S. C. Section 402, which indicates that the contempt of which Appellant was convicted is not a crime but may be punished as though it were.

(10) In refusing to hold that the sections as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and therefore violate, Article 1, Section 7 of the Constitution.

Summary of Argument.

I. Appellant contests the validity of Section 6514(2b), N. Y. Education Law, which permits revocation or suspension of a physician's license upon his conviction of "a crime" outside of New York. The Court below construed the term "crime" in the section so that revocation or suspension may be imposed in the sole discretion of the Regents though the offense on which the conviction was predicated is no offense and may be "even meritorious" in New York (R. 75). Appellant's failure in 1947 to produce before the House Committee the relief organization's records of which admittedly he had no possession, his failure to breach the confidence and trust reposed in the organization and in him, and the resulting contempt of which he had been convicted, are, concededly, no offense in New York (R. 45, 65). Concededly no moral turpitude was involved (R. 59, 67). Concededly Appellant had adopted the "traditional method by which such legal questions (constitutionality—our note) are raised (*Sinclair v. United States*, 279 U. S. 263)" (R. 55-6).

The section with its meaning so fixed, deprives physicians "of their right to practice if they offend against *any* law, *any* place," and "is too vague, too capricious, too unrelated to anything that a citizen of our State is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living,'" as Judge Fuld noted in his dissent (R. 79). This is particularly true because: (a) "crime" is limited by Section 22 of the N. Y. Penal Law and by the Court of Appeals elsewhere, to violations of the statutes of New York; (b) the Court of Appeals agreed it is the declared policy of New York not to impose domestic punishment for extra-territorial crime (R. 66, 69); (c) the states do not enforce the criminal laws of the United States; and (d) because for domestic purposes, the Court of Appeals has heretofore uniformly construed the term "crime"

to be restricted to foreign offenses that are also offenses in New York even though the phrase involved (as here), includes conviction of a crime in "any other state." *People ex rel. Marks* v. *Brophy*, 293 N. Y. 469.

Further, not only is the term "crime" undefined and unlimited in Section 6514, but the meaning attributed to "felony" in subdivision (1) conflicts with the meaning attributed to "crime" in subdivision (2b) of the same section. The "felonies" in subdivision (1) are restricted to those that are also made felonies under New York law; but here, the Court of Appeals adopted a discriminatory and conflicting definition, holding that even though "crime" in subdivision (2b) includes felonies as well as misdemeanors (R. 66), nevertheless it is *not* limited to offenses that are also made offenses in New York but that subdivision (2b) applies though the offense of which the physician was convicted is no offense or may be "even meritorious" in New York.

This is the result: when physicians (and the principle applies to lawyers and engineers), are convicted of federal felonies that are not felonies in New York, their licenses are not revoked under subdivision (1) of the same section of 6514, though moral turpitude is involved. But when a surgeon like Appellant is convicted of a *lesser* federal offense, namely of what is deemed a federal misdemeanor, that admittedly does *not* involve moral turpitude, that is not related to the medical practice, and that resulted from testing constitutionality, his license may be revoked or suspended under subdivision (2b) of the same Section 6514.

There is no rational justification for the discrimination, nor any relationship to the medical practice or to the welfare of the citizenry of New York.

Still further, although in its extended sense the term "crime" may mean any violation of law, nevertheless from Blackstone to the present it has been uniformly agreed that "in *common usage* the word 'crime' is made to denote such offenses as are of a *deeper or more atrocious dye;* while smaller faults and omissions of less consequence are com-

prised under the gentler name of 'misdemeanors' only." Section 6514(2b) requires conviction of a "crime". Appellant was convicted of what is deemed a federal misdemeanor, and not of a "crime" as it is commonly understood.

The right to continue in the practice of medicine is a right to liberty and property. The statute is admittedly penal in nature. The statute must be strictly construed. The vagueness doctrine applies. To deprive New York physicians of their licenses "if they offend against any law, any place" in the world, does not delimit the application of the term "crime", but "leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against"; it violates the "fair notice" precept, because "men of common intelligence must necessarily guess at its meaning and differ as to its application." *U. S.* v. *Cohen Grocery Co.*, 225 U. S. 81, 89; *Winters* v. *New York*, 333 U. S. 507, 524; *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

It is agreed that Appellant was testing constitutionality in his criminal trial (R. 48, 49, 55, 70). To impose this suspension in addition to the jail sentence and the original, actual suspension of his medical license suffered during his incarceration, is to violate the precept that "When the penalties" are "so severe as to intimidate" persons "from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited" them from "seeking judicial construction of laws which deeply affect" their rights. *Ex Parte Young*, 209 U. S. 123, 146, 147.

The sole "standard" to guide the Regents in selecting those "crimes" upon the conviction of which they may impose discipline, is the "good sense and judgment of our Board of Regents" (R. 67). But as Judge Fuld noted: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action," and "Such delegation, uncontrolled, in my judgment, as it is, violates first principles" (R. 79).

II. The Court of Appeals and the Regents agreed that no moral turpitude or professional unfitness was involved in the offense of which Appellant had been convicted (R. 59, 67, 70, 72). Appellant's offense was the "only method" and "the traditional method" by which constitutionality is tested, as the Regents' Committee on Discipline reported (R. 55).

Appellant has already suffered one punishment, namely five months in jail and an actual suspension of his license during his imprisonment, for testing constitutionality. To impose an additional suspension now in the absence of even moral turpitude or professional unfitness, in connection with an offense that is not related to the practice of medicine, would be the imposition of double punishment for the same offense. It is not within the province of the Regents to add punishment to punishment. Its sole province is to "protect the people from the ministrations of incompetent, incapable and ignorant persons, and to avoid the consequent harm to the health and physical well-being." *People* v. *Laman*, 277 N. Y. 368, 381.

"But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise" (Judge Fuld's dissent, R. 78). The legislation at bar must bear a "real and substantial relation to the public health, safety, morals, or some other phase of the general welfare"; otherwise it will "invade rights guaranteed by the Fourteenth Amendment." *Liggett* v. *Baldridge*, 278 U. S. 105, 111. *Herndon* v. *Lowry*, 301 U. S. 242, 258. Conditions imposed upon professional practice or the continuance thereof, must bear a real and substantial relationship to the profession involved. *Douglas* v. *Noble*, 261 U. S. 165, 168. *Dent* v. *West Virginia*, 129 U. S. 114, 121. *Cummings* v. *Missouri*, 4 Wall. 277, 319, 320. *Ex Parte Garland*, 4 Wall. 333, 377, 379. Discipline requires at least the presence of moral turpitude. *Jordan* v. *DeGeorge*, 341 U. S. 223, 227.

In the absence of even moral turpitude or professional unfitness, "his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest," as Judge Fuld noted (R. 79). The law abhors double punishment for the same offense. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex Parte Lange*, 85 U. S. 163, 168.

III. On the hearing before the Sub-Committee of the Medical Committee on Grievances, the Attorney General of New York repeatedly introduced evidence, over objection, to the effect that the then U. S. Attorney General had placed the organization on one of his lists (only *after* Appellant's conviction), that the complaint of the organization against the listing had been dismissed in the Federal Court and that the dismissal had been upheld in the U. S. Court of Appeals. The Medical Grievance Committee then imposed a six months' suspension. Subsequently, however, the listing decision was *reversed* by this Court in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. This reversal was called to the Regents' attention by their Committee on Discipline (R. 56). The Regents simply disregarded the report and recommendation of their own Committee on Discipline, disregarded the reversal by this Court, and accepted the recommendation of the Medical Committee on Grievances which was predicated primarily if not solely, upon that listing (R. 33). Judge Fuld stated that this was a "gross and prejudicial error" (R. 77).

The majority admitted the error, but, without factual or legal basis, treated it as one committed before a sentencing judge and not in a regular hearing, stated that the error was related only to the measure of punishment, and concluded that therefore the Court was "wholly without jurisdiction to review" (R. 68).

If the Regents can simply disregard the reversal by this Court, if it can overlook the "gross and prejudicial error" mentioned, "If the statutory authority of the Regents is, in truth, as the Court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits" especially "where that exercise (of discretion—our note) is unsupportable on rational grounds and becomes arbitrary and capricious" (Judge Fuld, R. 78).

The result was neither a fair, genuine or judicial hearing. It was a hearing and a decision based on an erroneous and reversed principle of law. It violated Section 6515(5) N. Y. Education Law which requires a determination based on "legal evidence." It deprived Appellant of due process. *Chin Yow* v. *United States*, 208 U. S. 8; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284. It violated the "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer*, 311 U. S. 457, 463.

IV. The sections as construed and applied, violate the precept against legislative abdication.

(a) The only "standards" to guide the Regents in selecting those offenses for the conviction of which they may impose discipline, are "the good sense and judgment of our Board of Regents." This is no standard or limiting guide, especially since the Legislature "did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries * * * and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license" (Judge Fuld, R. 74).

(b) The only "standards" to guide the Regents as to the measure of punishment to be imposed on physicians convicted of offenses, is again left to the "good sense and judgment" of the Regents, without even an attempt to insist on correlating the measure of punishment with the type of offense. The Regents thus have it within their unlimited power to re-

verse legislative intent by imposing revocation for slight offenses that may be "even meritorious" in New York, and by imposing a mere censure for serious offenses.

The legislative abdication is the more apparent in view of the statement by the majority that the courts are "wholly without jurisdiction to review" the measure of punishment imposed (R. 68) even though, as the dissent noted, the Regents' exercise of discretion in that regard, is "arbitrary and capricious" and "unsupportable on rational grounds" (R. 78).

(c) There was further legislative abdication as evidenced by the holding that the hearing mentioned in Section 6515 may be treated as a hearing before a sentencing judge, that the sole purpose of the hearing is to arrive at a measure of punishment and not to review the physician's actual guilt or innocence. This deprived Appellant of the protection of a real hearing and a determination of the "charges upon their merits" Section 6515(4). It is discriminatory against Appellant and all physicians because the Court of Appeals held elsewhere that though a lawyer may have been convicted of a federal felony by a Federal Court and jury, and though his conviction may have been affirmed by the U. S. Court of Appeals, nevertheless when he is brought up for disbarment the Board may and actually did review and found him not guilty and refused disbarment. *Matter of Donegan*, 294 N. Y. 704; 282 N. Y. 285.

This legislative abdication, without any standards or guideposts, makes the Regents absolute and immune in their power and in the unlimited discretion granted them. It promotes rule by men and not by "those impersonal forces which we call law." *Youngstown* v. *Sawyer*, 343 U. S. 579, 654; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. It offends the "traditional notions of fair play and substantial justice."

V. Physicians, lawyers and engineers, when convicted of federal felonies involving moral turpitude that are not made

felonies by the laws of New York, receive the benefit of the interpretation and policy adverted to before. But here, the Court below held that a surgeon, convicted not of a federal felony but of a misdemeanor, not involving moral turpitude, not related to the medical practice, will not receive the benefit of that interpretation and policy and may have his license suspended or revoked. There is no basis in justice, reason or in relationship to the medical practice, for such discrimination. It is invalid as discriminatory, class legislation. *Concordia* v. *Illinois*, 292 U. S. 535, 545. *Barbier* v. *Connolly*, 113 U. S. 27, 32. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-4.

Because of the listing of the organization, the disregard by the Regents of the reversal by this Court in the listing case, the temper of the times, and the change in political climate from original hostility to a favoring of the Franco regime, there is reason to believe the statutes were employed as a bill of attainder "to impose pains and penalties for past lawful association * * *," *Wieman* v. *Updegraff*, 344 U. S. 183; and "as a means for the infliction of punishment," *Ex Parte Garland*, 4 Wall. 333, 379.

VI. The offense of which Appellant was convicted occurred in the District of Columbia. The states cannot impose a domestic penalty for acts occurring in the District of Columbia where the United States has sole power of legislation and exclusive jurisdiction, especially in the absence of substantial relationship between the act complained of and the need for protection of the citizenry of New York, because "the State undertakes in this manner to go beyond its jurisdiction into territory where the United States has exclusive control." *Western Union* v. *Brown*, 234 U. S. 542, 547. *Western Union* v. *Chiles*, 214 U. S. 274, 278.

VII. Title 18 U. S. C., Section 402, enumerates those contempts which constitute "crimes". The alleged contempt of which Appellant was convicted is not listed there as a crime.

The section adds that other contempts may be punished according to other provisions of the law. Title 2 U. S. C., Section 192, under which Appellant was convicted, does provide for such punishment and states that the act shall be "deemed" a misdemeanor. Reading both sections together and according to the word "deemed" its natural meaning in its proper context as a "deeming" for "purposes of punishment," results in the conclusion that the act of which Appellant was convicted is not a crime but may be punished as though it were. But since it is not a crime, the Regents lacked jurisdiction because Section 6514(2b) requires conviction of a "crime". To denote the offense of which Appellant was convicted as a "crime", is to ignore a law of the United States, namely, Title 18 U. S. C., Section 402, in violation of Article VI of the Constitution.

VIII. Title 2 U. S. C., Section 192, under which Appellant was convicted, is the product of a Joint Resolution and not a Law, of Congress. Though a Joint Resolution and a Law go through the same preliminary processes, there is a distinct differentiation, stated in Article I, Section 7, of the Constitution. A Law becomes part of the law of the land. A Joint Resolution "takes effect" and merely expresses the sense or will of the Congress. In fact doubt was expressed in Congress when the Joint Resolution at bar was adopted.

Crimes must be predicated upon a Law or an Act of Congress, and not a Joint Resolution. *Donnelly* v. *U. S.*, 276 U. S. 505, 511. So that again, the contempt of which Appellant was convicted is not a crime. A Joint Resolution has "the effect" of law, but is not a Law. *Watts* v. *U. S.*, 161 F. 2d 511, c.d. 68 S. Ct. 81. Things equal in effect only, are not identical.

To disregard the differentiation mentioned in the Constitution between a Law and a Joint Resolution, is to disregard Article I, Section 7, of the Constitution.

POINT I.

The statutes under which Appellant's medical license was suspended, are so vague, unlimited, indefinite, capricious and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment.

Section 6514(2b) of the N. Y. Education Law permits suspension or revocation of a medical license upon the conviction of a New York physician "in a court of competent jurisdiction, either within or without this state, of a crime." In 1947 Appellant was convicted in the Federal Court in the District of Columbia, of failure to produce the organization's records before the House Committee. This act is deemed a misdemeanor under Title 2 U. S. C., Section 192, which does not require that the person subpoenaed have possession or control of the records. There is no such offense in New York. The Regents' Committee on Discipline noted: "default in the production of subpoenaed documents before the Congress or a Congressional committee is not a violation of any provision of the New York law" (R. 45).

The word "felony" is defined in Section 6514(1) by reference to Section 6502, as "any offense which if committed within the State of New York would constitute a felony under the laws thereof." The word "crime", however, is not defined in Sections 6514 or 6515. The Court of Appeals stated that it includes felonies and misdemeanors (R. 66). According to the Court of Appeals herein, Section 6514 means that if a New York physician is convicted outside of New York of what is a *felony* in the foreign jurisdiction but that is no offense in New York, his license cannot be revoked under subdivision 1, but if he is convicted "anywhere" in the world of an act that is a "crime" (felony or misdemeanor) there, but which in New York is either no crime or is "even meritorious" (R. 67), his license is subject to revocation under subdivision 2b. The Court of Appeals further held that the

"crimes" for which the Regents may revoke or suspend a physician's license, are left to the "good sense and judgment of our Board of Regents" (R. 67).

This position of the Court of Appeals is unprecedented, contradictory, and unsupported by any cited or other authority. In his dissent, Judge Fuld stated that the statute with its meaning so fixed, is unconstitutional because:

> "A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to 'the good sense and judgment' of the Regents, but, while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that 'crime' has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living' (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284). Such delegation, uncontrolled, in my judgment, as it is, violates first principles." (R. 79)

The word "crime" has always been delimited by Section 22 of the N. Y. Penal Law and by the declared policy of New York against domestic punishment for extra-territorial crime, to offenses committed outside of New York that are also made criminal by a New York statute. This was the position of the dissenting opinion, supported by every known authority. It is also the plain policy of subdivision 1 of Section 6514. Section 22 of the N. Y. Penal Law (McKinney's Consol. Laws of N. Y. vol. 39, Part I, page 27) states that: "No act * * *

shall be deemed criminal or punishable except as prescribed or authorized by * * * some statute of this state * * *." In *People ex rel. Blumke* v. *Foster,* 300 N. Y. 431, 433, the Court held: "In this State, no act or omission is a crime unless some statute of the State makes it so." Nevertheless the Court held here that "crime" in Section 6514(2b) includes the federal offense of which Appellant had been convicted even though it is no offense in New York.

The Court of Appeals agreed "it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction" but held Section 6514 was too plain for dispute (R. 66). Judge Fuld however, pointed out:

> "Experience has taught that sheer literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e.g., *People ex rel. Marks* v. *Brophy, supra,* 293 N. Y. 469; *Matter of Donegan,* 282 N. Y. 285; see, also, *Matter of Garsson* v. *Wallin,* 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra,* 282 N. Y. 285, 292), we said that discipline 'partakes of the nature of punishment,' with the consequence that statutes imposing discipline 'must be strictly construed,' and, in the *Marks* case (*supra,* 293 N. Y. 469, 474), we declared, to 'decree forfeitures * * * because of violations of the criminal laws of another jurisdiction,' is contrary to the established 'public policy of this State.'
>
> "For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to.

There is nothing new in the word 'convicted * * * without this state'; the *Marks* case (*supra*, 293 N. Y. 469) dealt with virtually identical language and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agreement —*conviction of 'a felony, "either in New York State or any other state"'*—declared (293 N. Y., at p. 474):

'The Atkins case (248 N. Y. 46, supra), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of "any felony," the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this relator should suffer a similar forfeiture if convicted of "a felony, either in New York State or any other state" meant the same thing.'

"Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to warrant the imposition of an additional penalty in this state. It must be a particular kind of conviction."

" 'Felony,' as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N. Y. 285) or the governor (*People ex rel. Marks* v. *Brophy, supra*, 293 N. Y. 469) used the word 'felony', they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N. Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (Sec. 88, subds. 3, 4; Sec. 477; now numbered

Sec. 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old Sec. 88, subd. 4; present Sec. 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and reasonably be presumed that our legislature, when it required disbarment for conviction of a federal 'felony', considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for violations of the laws of another jurisdiction and in view of the requirements that the statute be strictly construed.

"So, here, where the legislature has declared that it must be a conviction of a 'crime', the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving 'felony' and the one before us involving 'crime'—the argument is far stronger for limiting the term 'crime' than it is for limiting the term 'felony'. In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's 'without the state,' if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—'in some other state (or

country) * * * which we in New York consider non-criminal, or even meritorious.' [2]

"It seems almost incredible to me that the legislature could have contemplated that such 'non-criminal' or 'meritorious' acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is pointed out that such 'a literal construction * * * will empower the Board of Regents to destroy a person' without the slightest warrant—that 'some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases' (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184, 190, a 'statute's validity must be judged not by what has been done under it but "by what is possible under it."' And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career." (R. 72)

Not only is the word "crime" undefined and unlimited in scope, but the meaning attributed to "felony" in subdivision (1) of the same Section 6514, conflicts with the meaning

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"[2] The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (Sec. 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) Sec. 55-103, Sec. 41-811, and see Nations v. State, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e.g., Ala. Code (1940) tit. 48, Sec. 301 (31a); La. S. A.-C. C. (1950) Art. 45, Sec. 195; N. C. Gen. Stat. (1950) Sec. 62-121.71-72, and see *State* v. *Johnson*, 229 N. C. 701; S. C. Code (1952) Sec. 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) Sec. 56-329, and see *New* v. *Atlantic Greyhound Corp.*, 186 Va. 726.) And, in Kansas, it is a crime to sell or even to drink alcoholic liquor in a public place. Kansas Gen. Stat. (1949), ch. 41-719, 803, and see *State* v. *Shackle*, 29 Kans. 341."

attributed to "crime" in subdivision 2b. Though the same section permits revocation of a medical license upon conviction "of a felony," the meaning of "felony" is limited by subdivision 1 to an act that is made a felony under New York law, but the Court of Appeals held it is not so limited in the case of a "crime" despite the fact that the Court held that "crime" includes felonies and misdemeanors (R. 66).

If it is a felony under the federal law only, the statute is inapplicable according to the authorities mentioned in the majority and dissenting opinions. This is so despite the fact that the physician's act may involve narcotics (*Tonis* v. *Regents*, 295 N. Y. 286). In fact the Attorney General of New York stated on page 15 of his brief to the Court of Appeals in the *Tonis* case that "the test is * * * whether Dr. Tonis could have been convicted in the State courts and under the State law for the offense * * *." The same test was applied to an engineer's license in *Garsson* v. *Wallin*, 279 App. Div. 1111, aff'd 304 N. Y. 702. Garsson had been convicted in the Federal Court in the District of Columbia of a federal felony involving moral turpitude; conspiracy to defraud the United States by reason of certain relations with a Congressman. When it was sought to revoke his engineer's license in New York on the ground that he had been convicted of "a felony," the same Appellate Division at the same term as here, held that although he had been convicted of a federal felony, it was not a felony in New York and his license was not revoked since "the offense for which respondent was convicted is related exclusively to an act against the Federal Government. There is no such crime known to the Penal Law of the State of New York * * *." The Court of Appeals there affirmed.

This is the net result:

(a) When a physician is convicted of a federal felony involving narcotics and moral turpitude and is charged

under Section 6514(1) of the Education Law (*Tonis* v. *Regents*, 295 N. Y. 286), or when an engineer is similarly convicted of a felony involving moral turpitude and charged under Section 7210(1) of the Education Law (*Garsson* v. *Wallin*, 279 App. Div. 1111, aff'd 304 N. Y. 702), or when a lawyer is convicted of a mail fraud felony and is brought up for disbarment (*Matter of Donegan*, 282 N. Y. 285), the word "felony", which is plainly "a crime," receives one interpretation and the benefit of the policy against domestic punishment for foreign offenses. So settled is this policy, that it applies to a convict who was released on a commutation agreement that provided that the convict must serve out his term if he were convicted of a felony *"either in New York State or any other state."* Since he was convicted in the federal court of an act that was a felony there but that was not a felony in New York, there was no resulting breach of the commutation agreement and he did not have to serve out the balance of his term (*People ex rel. Marks* v. *Brophy*, 293 N. Y. 469).

(b) But when a physician is convicted of a *lesser* offense, namely a federal misdemeanor, that admittedly is *no* crime in New York, and that admittedly involves *no* moral turpitude or intellectual unfitness, he is met with a conflicting interpretation and policy, and his license is suspended.

The Court's interpretation of and policy toward "felonies" in subdivision 1 is in flat ... radiction of that toward "crime" (which is held to include felonies and misdemeanors) in subdivision 2b.

We fail to perceive any rational justification for this conflict and for this discriminatory interpretation, either in morals, reason or public policy. As the dissent pointed out "the argument is far stronger for limiting the term 'crime' than it is for limiting the term 'felony'" (R. 74).

The majority and dissenting opinions agreed there was no need to discuss the point mentioned by the Regents' Committee on Discipline that although there was no offense in New York identical with the one for which Appellant had

been convicted, there was a "similar" statute, contempt of the N. Y. State Legislature (R. 47), and the majority opinion remarked that this at least showed that New York policy was "in line" with the Federal policy (R. 66, 76). But the Regents' Committee on Discipline pointed out that this "similarity" was merely "assumed" by them (R. 47), not only because the State statute provides only for contempt of the State Legislature and not of Congress, but further because the State statute specifically requires "possession or control" of the books, which is not even mentioned in the Federal statute. In fact "the defense of lack of custody or control" was held to be "legally insufficient" in Appellant's trial in the Federal Court (R. 70). The State policy therefore differs from the Federal policy and the Regents' Committee on Discipline recognized that it was questionable whether a person in Appellant's position could have been convicted in New York for contempt of the State Legislature (R. 47), particularly since the secretary of the organization who did have possession was convicted for failure to produce the same records and further because Appellant and the others who were indicted and who did not have possession or control, were acquitted of conspiracy not to produce the records.

"Similarity" is too amorphous a concept to serve as the basis for invoking a statute that is penal in nature. All laws have some similarities, in some aspects or degrees, no matter how utterly different in nature. Usage of this concept would tend to equate laws of various jurisdictions though the public policies they purported to express, were antithetical. The "similarity" concept has been rejected where raised. *Ex Parte Briggs*, 52 Oregon 433; *People* v. *Martin*, 183 Misc. 790, aff'd 268 App. Div. 1077.

Not only have the New York courts heretofore without exception followed the policy and interpretation mentioned in the authorities cited in the dissenting opinion, but as a consequence they have uniformly applied the rule against imposing domestic punishment or disqualification for federal or foreign offenses because of the "considerations which have

been thought to preclude the enforcement of the penal laws of one state in the courts of another" (*Milwaukee County* v. *White*, 296 U. S. 268, 275), and because "one governmental authority will not enforce penalties for the violation of the criminal laws of another" (*Matter of Cohen*, 164 Misc. 98, aff'd 254 App. Div. 571, aff'd 278 N. Y. 584. *The Antelope*, 10 Wheat. 66, 123. *Logan* v. *U. S.*, 144 U. S. 263, 303. *O'Brien* v. *Neubert*, 3 Dem. (N. Y.) 161. *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102. *Sims* v. *Sims*, 75 N. Y. 466. *U. S.* v. *Lathrop*, 17 Johns. (N. Y.) 4, 7. *People* v. *Jennings*, 248 N. Y. 46, 52. *People* v. *Storali*, 172 Misc. 469). "The states do not enforce the criminal laws of the United States" (*People* v. *Welch*, 141 N. Y. 266, 275. *People* v. *Cook*, 220 App. Div. 110, 115, aff'd 248 N. Y. 597. *People* v. *Conti*, 127 Misc. 244).

The test of "literalism" employed by the Court of Appeals is answered in the quoted excerpt from the dissenting opinion as well as by the Court of Appeals itself in *Matter of River Brand* v. *Latrobe*, 305 N. Y. 36, 43: "a thing which is within the letter of the statute is not within the statute unless it be within the intention of the lawmakers, but a case within the intention of a statute is within the statute, though an exact literal construction would exclude it. It is a familiar legal maxim that 'he who considers merely the letter of an instrument goes but skin deep into its meaning,' and all statutes are to be construed according to their meaning, not according to the letter."

Further, although in its extended sense the term "crime" may include misdemeanors and mean any violation of a law, nevertheless "in common usage the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." Blackstone's Commentaries Wendell Ed. Bk. IV, Ch. 1, p. 5. A "crime" is a "Gross violation of human law, in distinction from a misdemeanor or trespass or other slight offense. * * * in present usage the term is commonly applied

to grave offenses * * *." Webster's New International Dictionary, 2nd Ed., Unabridged, Vol. 1, pp. 625-6. The term crime is "commonly used only of grave offenses." The Oxford New English Dictionary, Vol. II, p. 1172. A crime is "A grave offense against morality or social order." Funk & Wagnalls New Standard Dictionary, Medallion Ed. p. 614. "In a general sense the word 'crime' might mean any offense of a deep and more atrocious nature as distinguished from smaller offenses known as misdemeanors." *State* v. *Johnson,* 202 La. 926, 930-1. *State* v. *Scott,* 24 Vt. 127, 130. Where an insurance policy was to be void if the assured's death was caused by his "criminal violation of law" and his death was caused by violations of the traffic law which were "misdemeanors * * * and therefore in the technical legal sense, a crime," nevertheless the Court reviewed the distinction between "crime" and "misdemeanor", and held that "the layman would receive the impression if he did not already have it" that a crime "implies a wicked or heinous act" and to hold otherwise is "to ignore the common usage of the term." *Van Riper* v. *Constitutional Government League,* 1 Wash. 2d 635, 639.

Since the Court of Appeals agreed that the act of which Appellant had been convicted was devoid even of moral turpitude (R. 67), it does not fall within the ordinarily accepted meaning of "crime" and the statute should not have been applied to that offense. In any event, the undefined term "crime" in Section 6514(2b) is vague and set forth no standard for the Regents, namely whether the Regents are to use the definition of any violation of any law or the commonly accepted definition, namely an offense of a more atrocious dye as distinguished from a misdemeanor. Further, are the Regents to use New York standards of whether the act is a crime or a misdemeanor (even though the act is no offense at all in New York), or the standards of the foreign country or other foreign convicting jurisdiction? And what if the act is no crime but is "meritorious" in New York? What if in the foreign convicting jurisdiction only grave offenses are

crimes, and the offense is slight there but grave here, and vice versa?

The right to practice medicine is a valuable right to liberty and property, and "the right to continue" in any "lawful * * * profession * * * cannot be arbitrarily taken any more than * * * real or personal property can thus be taken." *Dent* v. *West Virginia*, 129 U. S. 114, 121-2. *Smith* v. *Texas*, 233 U. S. 630, 636.

Because discipline "partakes of the nature of punishment" the statutes "must be strictly construed." *Matter of Donegan*, 282 N. Y. 285, 292. Cases involving such discipline, involve, as the Court of Appeals mentioned, "the imposition of stringent additional penalties" (R. 66). Because of the "grave nature" of the punishment, and the fact that a "penalty" is involved, and because violation of the medical statute is the first step toward a crime since practice after suspension is a misdemeanor, such statutes are examined by the application of the vagueness doctrine. *Jordan* v. *De-George*, 341 U. S. 223, 231; *Small* v. *American*, 267 U. S. 231, 239.

"The crime 'must be defined with appropriate definiteness.' * * * Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act * * *." *Winters* v. *New York*, 333 U. S. 507, 515. What is invalid, is "the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin* v. *Commission*, 286 U. S. 210, 243.

To compel New York physicians to "live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place," as Judge Fuld noted (R. 79), does not delimit the application of the term "crime" but "leaves open therefore the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against." *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

As the dissenting opinion concluded: "The fact that 'crime' has been committed *somewhere*, is too vague, too capricious, too unrelated to anything a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation * * * that may destroy a person professionally, that may result in the loss of all that makes life worth living" (R. 79).

It is unreasonable to attribute to New York physicians a reasonable expectation that conviction of any type of offense "anywhere" in the world, that is not a crime in New York, that may be "even meritorious" in New York, that is not related to the practice of medicine, endangers their New York medical licenses, nor did any judicial opinion heretofore rendered ever charge them with such knowledge. Such a statute hardly falls within the "fair notice" precept, *Winters* v. *New York*, 333 U. S. 507, 524. It makes a New York medical license hostage to the morals, policies and laws of the rest of the world, known or unknown.

"No one may be required at peril of life, liberty or property, to speculate as to the meaning of penal statutes. * * * 'a statute * * * so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. "Before a man can be punished, his case must be plainly and unmistakably within the statute." *U. S.* v. *Brewer*, 139 U. S. 278, 288.

Further, Appellant was testing constitutionality in his "test case" in the Federal Court in the District of Columbia. On the appeal from his conviction, one Judge agreed with Appellant's contentions as to constitutionality (*Barsky* v. *U. S.*, 167 F. 2d 241). A statute so vague, unlimited and conflicting in form and as interpreted, as in addition to permit within the scope of its language a prohibition against "seeking judicial construction" and testing of new constitutional issues upon pain and penalty of loss of a medical license on top of the jail punishment and actual suspension

exacted and paid for the constitutional test, is void, oppressive and repugnant to the equal protection and due process precepts. As the Court held in *Ex Parte Young*, 209 U. S. 123, 146, 147: "when the penalties * * * are * * * so severe as to intimidate * * * from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited * * * seeking judicial construction of laws which deeply affect * * * rights." *Wadley* v. *Georgia*, 235 U. S. 651, 662, *et seq.*

If a physician cannot invoke his right to test legislative acts without the fear of losing his livelihood in addition to the sentence served for the test, he loses the rights of a citizen. The physician becomes a cowed vassal of the state. The law becomes a bill of attainder directed against physicians who would test the constitutionality of legislation or acts in pursuance thereof. It violates first and fundamental principles.

To construe Sections 6514(1) and 7210(1) of the Education Law, as well as the disbarment statutes, so that the licenses of a physician guilty of a federal felony involving narcotics, and an engineer guilty of a federal felony involving a conspiracy to defraud the United States, and a lawyer guilty of a federal felony involving a mail fraud, are not revoked or suspended, and yet to hold that Appellant's license may be suspended or even revoked on conviction of a lesser federal offense that is not a crime in New York and that involves neither moral turpitude nor intellectual unfitness, promotes "irrational discrimination" (*Goessart* v. *Cleary*, 335 U. S. 464, 466) and offends the traditional concepts of "fair play and substantial justice." *Milliken* v. *Meyer*, 311 U. S. 457, 463. *McDonald* v. *Mabee*, 243 U. S. 90, 91.

To answer all these contentions as the Court of Appeals did, that the type of crimes the Regents will select for discipline, must be left to their "good sense and judgment" (R. 67), condones legislative abdication without standards and points up the invalidity of the statute. As Judge Fuld

stated: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action" (R. 79). The statute, "in the absence of narrowly drawn reasonable and definite standards for the officials to follow must be invalid. * * * No standards appear anywhere; no narrowly drawn limitations, no circumscribing of absolute power; * * *. It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here." *Niemotko* v. *Maryland,* 340 U. S. 268, 271.

To hold that the crimes intended to be punished in Section 6514(2b) are those to be selected by the "good sense and judgment" of the Regents, "would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to public interest when unjust and unreasonable in the estimation of the court and jury." *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 89. In fact acts chosen for discipline by the "good sense and judgment of our Board of Regents" (R. 67) are not even limited by the requirement that they be "detrimental to public interest when unjust and unreasonable."

"It is obvious that this is no narrowly drawn statute. * * * it would seem to be warrant for conviction for agreement to do almost anything which a judge or jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." *Musser* v. *Utah,* 333 U. S. 95, 96-7. A statute which, as interpreted and applied, leaves these matters to an administrative board's "good sense and judgment", is even broader than those described above.

As the dissent stated, the test of "good sense and judgment" also overlooks the precept that "a statute's validity must be judged * * * 'by what is possible under it' " (R. 75).

The very purpose of the Constitution was to substitute the command of the law for the "good sense and judgment" of men in matters touching the fundamental rights of life, liberty and property. It does not save the constitutionality

of the law to say that perhaps the Regents will not revoke or suspend a license on some insubstantial ground. It is sufficient to condemn the law that it "authorizes" the Regents to do so, because "it is in this light that the validity of the statute must be determined." *Bailey* v. *Alabama*, 219 U. S. 219, 235.

POINT II.

The statutes on their face and as construed and applied violate the due process clause of the Fourteenth Amendment and the constitutional prohibition against double jeopardy and double punishment by predicating the suspension or revocation of a New York medical license upon the extra-territorial conviction of an act that involves neither moral turpitude nor intellectual unfitness, that is not related to the practice of medicine or to the welfare of the citizenry of New York.

The Court of Appeals fixed the meaning of the statutes here so that a New York physician convicted outside of New York of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine, may nevertheless have his license revoked or suspended. The Court based its decision on the ground that "The Legislature knows how to state such limitations when it so desires * * *" (R. 67). Judge Fuld, however, stated:

> "In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see Sinclair v. United States, supra, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients." (R. 72)
>
> * * * * *

"It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent or dishonest practitioners of medicine or of plumbing is, of course, for the Legislature to decide. But there can be no gainsaying the fact that the Legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos* v. *United States District Court*, 19 F. 2d 722.)" (R. 78)

Appellant served a prison sentence and an actual suspension for those five months from his medical practice. He now faces the additional punishment of an additional six months' suspension of his practice by reason of that conviction which the Court of Appeals agreed involved no moral turpitude: "see, as to there being no moral turpitude in this offense, *Sinclair* v. *U. S.*, 279 U. S. 263, 299" (R. 56).

In *Liggett* v. *Baldridge* (278 U. S. 105, 111-113), this Court held:

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.

"* * * A state cannot 'under the guise of protecting the public, arbitrarily interfere with * * * lawful oc-

cupations or impose unreasonable and unnecessary restrictions * * *.'"

California Reduction v. *Sanitary,* 199 U. S. 306, 318; *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 278.

"The judgment of the Legislature is not unfettered. The limitation upon individual liberty must have some appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." *Herndon* v. *Lowry,* 301 U. S. 242, 258.

If the statute "purported to confer arbitrary discretion to withhold a license or to impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment." *Douglas* v. *Noble,* 261 U. S. 165, 168. The N. Y. Court of Appeals itself held elsewhere that the medical statutes of New York "are designed to protect the people from the ministrations of incompetent, incapable and ignorant persons, and to avoid the consequent harm to their health and physical well-being." *People* v. *Laman,* 277 N. Y. 368, 381.

Conviction of a foreign offense that New York itself has not declared in its Penal Law or elsewhere to be violative of the general welfare of the people of New York, should not enable an administrative agency of New York to suspend a medical license when the sole interest of that agency is to regulate the practice of medicine in the interest of the public of New York. "If detriment to the public health * * * has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced * * * and none exists." *Liggett* v. *Baldridge,* 278 U. S. 105, 114.

Since "the right to continue" in a profession "cannot be arbitrarily taken," if "the conditions imposed by the state (are) for the protection of society * * * for the general welfare of its people * * * to secure them against the consequences of ignorance and incapacity as well as deception and fraud," and if the regulations "are appropriate to the calling

or profession * * * no objection to their validity can be raised * * *. It is only when they have no relation to such calling or profession * * * that they can operate to deprive one of his right to pursue a lawful vocation." *Dent* v. *West Virginia*, 129 U. S. 114, 121, 122.

Legislation requiring the taking of an oath that the individual was not guilty of specified acts, in order to be permitted to continue in his profession, was declared invalid because "the acts * * * have no possible relation to their fitness for those pursuits and professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrollment or draft in the military service * * * and his fitness to teach the doctrines or administer the sacraments of his church * * *. It is manifest upon a simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition for allowing the exercise of the professions and pursuits." *Cummings* v. *Missouri*, 4 Wall. 277, 319, 320; *Ex Parte Garland*, 4 Wall. 333, 377, 379. The *Cummings* and *Garland* cases hold that persons "cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions." *Dent* v. *West Virginia*, 129 U. S. 114, 128.

The N. Y. Court of Appeals itself held elsewhere that a liquor license should be revoked only where "the violations were of such a character and were so closely identified in time and circumstances with the business under regulation that we may not say that the revocation was without authority or in any way an abuse of regulatory power." *Matter of Colonial Liquor Distributors* v. *O'Connell*, 295 N. Y. 129, 141.

An attorney might be disciplined "if convicted of a misdemeanor which imports fraud or dishonesty." *Ex Parte Wall*, 107 U. S. 265, 273. Assuming, arguendo, that disci-

pline could or should be predicated on moral turpitude, surely discipline requires at least the presence of moral turpitude. "The presence of moral turpitude has been used as a test in a variety of situations including legislation governing the disbarment of attorneys and the revocation of medical licenses." *Jordan* v. *DeGeorge*, 341 U. S. 223, 227. And even in the *Jordan* case, "Mr. Justice Black, Mr. Justice Frankfurter and I [Mr. Justice Jackson] cannot agree, because we believe the phrase 'crime involving moral turpitude' * * * has no sufficiently definite meaning to be a constitutional standard for deportation" (341 U. S. at 232).

In the admitted absence of even moral turpitude, the suspension or revocation of a medical license because of a physician's conviction of what is deemed a misdemeanor in a jurisdiction foreign to New York, is additional punishment for the same offense. The N. Y. Court of Appeals itself recognized this elsewhere when it held: "Denial or revocation of a license because of guilt of an offense which tends to show moral or intellectual unfitness does not constitute punishment for this offense * * *. It is only a measure of protection to the public." *Mandel* v. *Regents*, 250 N. Y. 173. So that suspension for an offense which does *not* show "moral or intellectual unfitness" *is* double punishment.

"The disabilities created * * * must be regarded as penalties—they constitute punishment." *Cummings* v. *Missouri*, 4 Wall. 277, 320; *Ex Parte Garland*, 4 Wall. 333, 377, 379; *United States* v. *La Franca*, 282 U. S. 568, 575. The Court of Appeals stated here that Section 6514 "empowers the Regents to impose a penalty" and that the statute is "stringent" (R. 68).

But Appellant was punished once. He served a jail sentence in Virginia, hundreds of miles from his wife and child, where he was permitted two visiting hours a month (S.M. p. 247). He also suffered an actual suspension of his medical license for those five months. To punish him again by still another suspension of his medical license for an extra-territorial offense devoid of moral turpitude, unrelated to his

profession, unrelated to the regulation of medical practice in the public interest, is double punishment for the same offense. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense," and "no narrow or illiberal construction should be given" to this precept. *Ex Parte Lange,* 18 Wallace 85 U. S. 163, 168, 178. *Coy* v. *U. S.,* 156 F. 2d 293, 295. Constitution of New York, Article 1, Section 6, in McKinney's Consol. Laws of N. Y., Vol. 2, page 95.

As Judge Fuld noted here:

> "For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex Parte Garland,* 4 Wall. (U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this court, prevent any other conclusion." (R. 79)

The Court of Appeals cited only *Hawker* v. *New York,* 170 U. S. 189, 196, to the effect that "the commission of crime, the violation of the penal laws of a State, has some relation to the question of character." But the *Hawker* case bears out Appellant's contentions: (a) The crime involved there was a felony, not a misdemeanor. "In *Hawker* v. *New York* • • • the Court upheld a statute forbidding the practice of medicine by any person who had been convicted of a felony." *Garner* v. *Los Angeles Board,* 341 U. S. 716, 722. Plainly, therefore, when this Court spoke of "crime" and its relationship "to the question of character," it was speaking of a felony or an offense of a grave nature. Surely the Regents will not contend this Court meant that every offense, including those illustrations mentioned by Judge Fuld in his dissent (R. 75), reflect adversely on character. It does not seem

necessary to adduce numerous additional illustrations of offenses in foreign countries or in the states that are misdemeanors but do not reflect adversely on character. (b) The crime there involved the performance of abortions and was therefore directly connected with the practice of medicine, unlike the case at bar. (c) The conviction there was a conviction in New York and of an act that was made a felony by the laws of New York, again unlike the situation at bar. Accordingly, this Court pointed out, at page 196, that "When *the* Legislature decides that whoever has violated the criminal laws of *the* State shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule," especially since it involves "a conviction duly had in one of the courts of *the* State," and because in so acting it is seeking "to protect *its* citizens." Accordingly, this Court held that it was not unconstitutional to deny admission to practice to one whose requisite character was lacking in that he had been convicted in New York of a New York felony in connection with the New York medical practice. Even then, three of the Justices dissented.

On the contrary, in the situation at bar there is ample support for the feeling that the offense of which Appellant had been convicted reflects well on his professional standing. As a physician who had nothing to gain, he refused to breach the confidence and trust reposed in the organization and in him, under the pain and penalty of an actual jail sentence and an actual suspension of his medical license, to avoid harm, imprisonment and possible death to the families of those persons who were still in Spain. Small wonder then that prominent persons in many professions appealed to the Regents on behalf of the Appellant (S.M. pp. 423-450). As Dr. Albert Einstein concluded:

> "My opinion is that your attitude in the case of the Joint Anti-Fascist Refugee Committee was the only one a man of moral responsibility could have taken. I am sure that I myself would have acted in precisely the same way." (S.M. p. 434)

Small wonder that Judge Fuld noted:

> "the present decision has an importance that transcends and reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me." (R. 76)

POINT III.

The Court of Appeals refused to interfere despite the fact that the determination was predicated upon the listing and despite the Regents' disregard of the reversal in the listing case by this Court in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123. The result was a violation of the constitutional precept against legislative abdication, and this admittedly "gross and prejudicial error" deprived Appellant of a genuine or judicial hearing and of his liberty and property without due process.

The Court of Appeals refused to interfere even though admittedly the Regents "ignored weighty considerations and acted on matters not proper for consideration" (R. 68). Section 6515(5) requires that a determination be based upon "legal evidence."

In the hearing before the Sub-Committee of the Medical Committee on Grievances, the Attorney General of New York, over objection, repeatedly adverted to the fact, in page after page of testimony, that the organization had been placed on the U. S. Attorney General's list (S.M. pp. 394-402). (It had not been on the list for the years prior to or even at the time of Appellant's indictment or conviction, but was first "listed" some eight months after the indictment.) The Attorney General of New York also adduced testimony over objection, that the complaint of the organization against the U. S. Attorney General in connection with that listing had been dismissed by the District Court and that the dismissal had been affirmed by the U. S. Court of Appeals (S.M. p.

399). The Sub-Committee of the Medical Committee on Grievances and the entire Medical Grievance Committee predicated their decision to suspend Appellant's license, if not completely at least in part, upon that listing (R. 33). But subsequently this Court reversed. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. Plainly the reference to the listing constituted, as Judge Fuld noted, "gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.)" (R. 77). *United States* v. *Remington*, 191 F. 2d 246, 252.

Despite the reversal by this Court noted in the subsequent report of the Regents' Committee on Discipline (R. 56), the Regents simply disregarded the report and recommendation of its own Committee on Discipline, disregarded the reversal by this Court, and upheld the determination and recommendation of the Medical Committee on Grievances in imposing this six months' suspension. But since that determination occurred *prior* to the reversal by this Court and since that determination was predicated on this illegal evidence, the suspension was not based on the "legal evidence" mentioned in Section 6515(5). Despite this undisputed, patent, gross and prejudicial error, the Court of Appeals not only refused to review the Regents' determination as to guilt but also held that "we are wholly without jurisdiction" to review the measure of punishment (R. 68).

There is nothing in the record or findings to indicate that the error complained of was committed only in connection with the measure of discipline or punishment. The error was committed during the hearing at which the guilt or innocence of the Appellant was to be determined, and not during any special or separate hearing held subsequent to a finding of guilty and relating solely to the measure of punishment. There is nothing in the record to indicate that the Regents related this illegal evidence solely to punishment. The cases cited by the Court of Appeals are therefore not in point. For example, the Court of Appeals cited *Williams* v. *New York*, 337 U. S. 241, 246, where the issue involved mat-

ters before a sentencing Judge. But the hearing at bar was not such a hearing. Secondly, the evidence complained of was doubly illegal in that the organization had not been listed for the year prior to or even at the time of Appellant's indictment or conviction. It was listed only some eight months after the indictment, and Appellant resigned from the organization while he was imprisoned and about a year prior to the hearing before the Regents (S.M. p. 367).

The significance of the "listing" is demonstrated by what occurred at the hearing. Since the operations of the organization and the motives of the Appellant were not material in the criminal trial (R. 48, 50, 70), Appellant, at the hearing before the Sub-Committee of the Medical Grievance Committee, offered voluminous, uncontradicted and documented proof of the workings of the organization and of Appellant's role and motives, all of which "are material here" as the Regents' Committee on Discipline stated (R. 53). There then came a point when the three members of this Sub-Committee declared themselves unequivocally convinced that the organization was a genuine relief organization devoted to the cause claimed:

> "Dr. Ayers: Mr. Fishbein, may I speak individually for the committee. We have appreciated immensely all this evidence that you have brought here and all the evidence that has been brought out here * * * the amount of money given for a cause, who it went to, the bank account substantiating it, the licensing by the committee which you mentioned. I can say for myself that it is beautifully given, but if you had one hundred more samples of them to offer, we couldn't believe it any more than we already do. You have offered splendid evidence here of what you are trying to do. One other article wouldn't enhance our belief in this." (S.M. p. 285)

Finally Appellant offered to introduce in evidence a motion picture narrated by Quentin Reynolds that would run only some 20 minutes and would furnish visual proof of the activities of the organization. Appellant had a projectionist and a screen at the hearing. The chairman stated:

> "Chairman Shearer: Mr. Fishbein, you have been very zealous and very able and you have given us such a beautiful picture of the workings of this organization, that it requires nothing more like a movie or anything else. To show us anything more would be accumulative and unnecessary. The entire committee feels the same way and the objection is sustained." (S.M. p. 375)

Despite these repeated assertions that they were convinced, they predicated their decision upon conjecture instead of proof. Their attitude was summarized by the Regents' Committee on Discipline:

> "conjecture cannot take the place of evidence."
>
> * * * * *
>
> "We disagree with the Attorney General's position, stated here and elsewhere and reflected in the findings of the Medical Committee on Grievances, that, because Respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts that he may now be disciplined on the assumption that facts not shown by evidence to have existed might have been disclosed had the records been produced." (R. 56, 59)

On the one hand the Sub-Committee of the Medical Committee on Grievances stated they were so convinced, they would accept no further proof; on the other hand, they disciplined Appellant on the conjecture "that facts not shown by evidence to have existed might have been disclosed had the

records been produced." Lacking this proof, the Sub-Committee relied on the listing (R. 33). The full Medical Committee on Grievances accepted their report and imposed the six months' suspension, by a close vote (R. 34). Thereafter the Regents, disregarding the report of their own Committee on Discipline, voted to accept the determination of the Medical Committee on Grievances, and confirmed the six months' suspension. Plainly, the listing was the primary if not the sole basis of the determination.

It is only realism to recognize that this listing and the dismissal of the organization's complaint in the courts below this Court, undoubtedly furnished the raison d'etre of this entire proceeding against Appellant. Had it been another organization, it is fair to assume that nothing would have happened. In any event, a hearing at which evidence of the listing plus evidence of dismissal of the organization's complaint plus evidence of the affirmance of the dismissal may be adduced and used in the findings, but in which the Regents may disregard the reversal by this Court, is a hearing not supported by legal evidence, a hearing involving the application of an erroneous and reversed principle of law, and not a fair hearing.

The refusal of the Court of Appeals to review despite the fact that this error is not disputed, deprived Appellant of the guarantee of due process. As Judge Fuld stated:

> "After noting that the courts would ultimately have to decide whether appellant's crime was one contemplated by the statute, the Regents' Committee turned to the subject of discipline and wrote that there was no basis in the facts presented for any punishment greater than censure and reprimand:
>
> " 'While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline, beyond the statutory minimum of censure and reprimand must,

we believe, be based either on the inherent nature of the respondent's violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline.'

"And it ended its report in this way:

"'Since violation of the Federal statute which * * * [appellant] has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of * * * [appellant's] explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that * * * [appellant's] license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded.'

"The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances * * *." [3] (R. 76)

"In the course of its opinion, the court has written (Opinion p. 6):

"'As to the assertions, by appellants, that the Regents *dealt too severely with them,* or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for*

"[3] While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that 'Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-General of the United States.' Reliance upon that fact, was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123.)"

> *consideration,* it is enough to say we are wholly without jurisdiction to review such questions.' (Emphasis supplied.)
>
> "However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits." (R. 78)

As was held in *Ng Fung Ho* v. *White,* 259 U. S. 276, 284:

> "Courts have no power to interfere unless there was either denial of a fair hearing, *Chin Yow* v. *United States,* 208 U. S. 8; or the finding was not supported by evidence; *American School of Magnetic Healing* v. *McAnulty,* 187 U. S. 94, or there was an application of an erroneous rule of law. * * * It (deportation) may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction offered by judicial proceedings, the Fifth Amendment affords protection in its guaranty of due process of law."

The refusal of the Court of Appeals to intervene despite the undenied "gross and prejudicial error," the admission of the illegal evidence at the hearing, and the disregard of the reversal of the "listing" case by this Court, violates the due process concept and offends the "traditional notions of fair play and substantial justice." *Milliken* v. *Meyer,* 311 U. S. 457, 463; *McDonald* v. *Mabee,* 243 U. S. 90, 91; *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316; *Travelers Health Ass'n* v. *Virginia,* 339 U. S. 643.

POINT IV.

The statutes on their face and as construed and applied, violate the constitutional precept against legislative abdication, without guide-posts or standards, in connection with the crimes to be selected by the Regents for discipline, the measure of punishment to be imposed, the hearings, and the evidence, and deprived Appellant of a genuine and judicial hearing, and of his liberty and property without due process.

(a) As to the crimes to be selected for discipline, the Court of Appeals held here that the Regents have unlimited power to revoke the license of a New York physician who has been convicted of any crime, "anywhere" in the world, and even though the act is meritorious in New York (R. 67, 75, 79).

As Judge Fuld noted in his dissent:

> "In enacting the provision under consideration, it is, of course, obvious that the Legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries * * * and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts * * * and I cull from the Court's opinion (p. 4)—'in some other state (or country) * * * which we in New York consider non-criminal, or even meritorious.'" (R. 74)

The Court of Appeals stated plainly that there are no standards or limitations to guide the Regents in the crimes they may choose to discipline, except the "good sense and judgment of our Board of Regents" (R. 67). In the meantime, as Judge Fuld pointed out, physicians must "live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place" (R. 79).

The fear is constant because no time limit is involved and what is "good sense and judgment" on the part of one Board of Regents may change with changing times or subsequent Boards. As the dissent pointed out: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action" (R. 79).

In Point I it was urged that "good sense and judgment" was too indefinite and unlimited to serve as a constitutional standard for revocation or suspension of a medical license. Repetition here is unnecessary except to point out that the same arguments and authorities mentioned there are applicable in connection with this point, namely the constitutional prohibition against legislative abdication, without standards or guide-posts, as to the crimes to be the basis for disciplinary action against a physician. As this Court held in *United States* v. *Reese*, 92 U. S. 214, 221:

> "It would certainly be dangerous if the legislature could set a net large enough to call all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

If the courts are thus delimited, certainly an administrative board should be, especially when its admitted function is to regulate the practice of medicine to protect the public and not to add punishment to punishment. To endow the Regents with this "net large enough to catch all possible offenders," to permit them to use their particular brand of "good sense and judgment" in selecting the offenders they may want to punish, to permit them to employ their office as a cloak to inflict additional punishment on physicians for matters unconnected with the medical practice, is to open up vast fields of political and related ramifications whose consequences need no belaboring. The law would become a

dangerous weapon in the hands of the Regents, and the physician a second class citizen. It is unconstitutional "to leave room for the play and action of purely personal and arbitrary power. * * * For the very idea that one may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369. "The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law." *Youngstown* v. *Sawyer,* 343 U. S. 579, 654.

(b) There is also complete legislative abdication with respect to the punishment to be imposed. In the N. Y. Penal Law, like the federal criminal code and the penal laws of other jurisdictions, the Legislature defined the various crimes, defined the degrees of the crimes, and fixed appropriate ranges of punishment to fit the particular crimes involved. Such guide-posts and standards are utterly lacking here. In fact here the Regents have unlimited discretion to reverse the legislative intent indicated in the penal law. The statutes in question merely state that the Regents may impose any discipline ranging from censure through revocation, but there is no guide-post or standard as to which crimes draw what punishments. On the one hand the Regents thus have the power to revoke a medical license for an extra-territorial offense that is "even meritorious" in New York and that involves no moral turpitude or intellectual unfitness. On the other hand the Regents may impose a mere censure upon a physician who commits a serious crime directly connected with his medical practice. What is more, the Court of Appeals stated here that the courts are "wholly without jurisdiction" to interfere with the measure of punishment visited by the Regents upon a New York physician, and this even though the Regents may have "ignored weighty considerations and acted on matters not proper for consideration" (R. 68). The Regents are therefore declared to be utterly im-

mune by statute and by judicial declaration. As Judge Fuld stated:

> "However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitutional limits." (R. 78)

As the dissenting opinion concluded, such unlimited power and unfettered discretion "as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the Legislature" (R. 78), and is "not merely delegation run riot but legislative abdication," and "violates first principles" (R. 79). These statements are particularly apposite in view of the report of the Regents' own Committee on Discipline that "we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand" (R. 59).

If the Regents' power is so unfettered and unlimited that it can disregard the evidence, disregard the "gross and prejudicial error" mentioned, disregard its own Committee's report, disregard the reversal by this Court in the "listing" case, and if such arbitrary and capricious power, "unsupportable on rational grounds," cannot even be reviewed judicially, then truly what is involved is "legislative abdication" that "violates first principles" and offends the "traditional notions of fair play and substantial justice." State action must "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'land of the land'." *Hebert* v. *Louisiana*, 272 U. S. 312, 316.

As was pointed out in the rate-making cases like *Ex Par*
Young, 209 U. S. 123, 147:

> "If the law be such as to make the decision of th
> legislature or of a commission conclusive as to th
> sufficiency of rates, this court has held such a law t
> be unconstitutional. Chicago, etc. Railway Co. v
> Minnesota, 134 U. S. 418."

We find it difficult to perceive why review should not have
been similarly sanctioned here. Absent that power of review,
it is submitted that the law is unconstitutional.

(c) There is ambiguity and contradiction, without standards or guide-posts, as to the purpose of the "hearing" mentioned in Sections 6514(2) and 6515(4). The Court of Appeals held here that the hearing is solely for the purpose of adducing testimony reflecting upon the punishment, because, "Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties" (R. 68), but this testimony "could not change the admitted fact of their conviction" (R. 65). The Court of Appeals thus held that as far as this Appellant is concerned, the hearing before the Regents was a hearing before a "sentencing judge" and not a hearing to determine his actual original guilt or innocence. But Section 6515(4) states that the charges must be determined "upon their merits" and the physicians can be "found guilty" or "not guilty." Appellant had adduced voluminous testimony, utterly contradicted, to show that although he had been found guilty in the criminal trial which had been limited to the constitutional issues, he was not actually guilty. The Regents' own Committee on Discipline understood it to be its function and duty to delve into the evidence to determine guilt or innocence, as indicated

by its statement that the evidence summarized at the outset of this brief was not material in the criminal trial but it is "material here" (R. 53). Having received the evidence, it concluded "Our examination of the record discloses no such basis * * * for concluding that these views and assertions were not honestly held and made," and they "sufficiently explain the refusal * * * to produce the * * * records, that being the only method by which the legal objections * * * could be judicially determined and the traditional method * * * " (R. 57, 58).

The holding of the Court of Appeals here is in direct conflict with the wording of the statute, with the concept of the hearing held by the Regents' Committee on Discipline, and also with its holding in *Matter of Donegan*, 265 App. Div. 774, aff'd 294 N. Y. 704, where the Court, mindful of the holding in *Matter of Donegan*, 282 N. Y. 285, that the foreign conviction is only a "prima facie finding of guilt," sanctioned the use of the hearing to establish innocence despite a prior conviction. There, an attorney had been convicted of a mail fraud in the Federal Court in New York, by a Court and jury. The conviction was affirmed by the U. S. Court of Appeals. Nevertheless when he was brought up in disbarment proceedings, it was held that the Board had the right to re-examine the question of innocence or guilt. Thereafter he was found to have been innocent despite the fact that the Federal Court and jury had found him guilty. The recommendation against disbarment was upheld by the Court of Appeals. The Court of Appeals at bar has plainly adopted a conflicting and discriminatory procedure.

The Regents are therefore apparently to have unlimited power and discretion to declare that on some occasions hearings will be limited to establishing the conviction and the taking of testimony will merely be for purposes of fixing the punishment; that on other occasions, the hearing will be used as an independent search into the physician's original guilt or innocence. At no time was Appellant informed that this was the purpose of the hearing, nor could he or his attorney

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The Regents are therefore apparently to have unlimited power and discretion to declare that on some occasions hearings will be limited to establishing the conviction and the taking of testimony will merely be for purposes of fixing the punishment; that on other occasions, the hearing will be used as an independent search into the physician's original guilt or innocence. At no time was Appellant informed that this was the purpose of the hearing, nor could he or his attorney

have reasonably reached that conclusion from the statutes from any prior judicial decision, from the Regents' Sub Committee of the Medical Committee on Grievances or from the Regents' Committee on Discipline.

Such "hearings" at the discretion of the Regents, sanctioned by the Court of Appeals, are no real hearings. They guarantee the physician just one thing: that the Regents will use their limitless discretion as they see fit, their "good sense and judgment," and no court will interfere.

Further, Section 6514 is not limited to discipline predicated upon convictions of crimes. Exclusive of subdivision 2b, all the other subdivisions refer to matters that must of necessity be examined in a genuine hearing; they cannot be established as readily as a prior conviction. Therefore the hearings provided for in Section 6515 must of plain necessity involve hearings on all the facts and merits. There is nothing in Section 6515 that can possibly serve as the basis for a restricted hearing, limited in the manner the Court of Appeals here sanctions, when subdivision 2b of Section 6514 is involved. So to delimit the hearing, to disregard the evidence adduced on that hearing bearing on the physician's original guilt or innocence, is to deprive Appellant of a real hearing.

That the Court of Appeals intended to treat the role of the Regents here as that of a "sentencing judge," is confirmed by that Court's citation of *Williams* v. *New York*, 337 U. S. 241, 246, *et seq.* A hearing before a "sentencing judge" on an application to revoke a medical license, is no hearing at all. To sanction a total disregard of the evidence as far as original guilt or innocence is concerned, to suspend Appellant's license despite the detailed report of the Regents' own Committee on Discipline and the evidence, and without hearing any of the witnesses or attorneys, is to deprive Appellant of a genuine and a judicial hearing and of his liberty and property without due process, *Ng Fung Ho* v. *White*, 259 U. S. 276, 284, and to offend "the traditional notions of fair play and substantial justice."

There is, therefore, uncontrolled delegation of power to the Regents as to the crimes they may select for discipline, the evidence they may receive, the type of hearings they may conduct, namely either true hearings or hearings before a "sentencing judge," and also uncontrolled delegation as to the punishment they may inflict. The exercise of the Regents' discretion, pursuant to that delegation, was held by the Court of Appeals here to be non-reviewable. As the dissenting opinion stated:

> "Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small* v. *Moss*, 279 N. Y. 288, 299, we declared that 'The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,' and in *Packer Collegiate Inst.* v. *University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we stated that 'there must be a clearly delimited field of action and, also standards for action therein.' (See also *Niemotko* v. *Maryland*, 340 U. S. 268, 273; *Matter of Fink* v. *Cole*, 302 N. Y. 216, 225.) The wisdom of that constitutional safeguard is highlighted by its disregard in this case." (R. 79)

Similarly:

Field v. *Clark*, 143 U. S. 649, 692;

U. S. v. *Grimaud*, 220 U. S. 506, 520;

Panama v. *Ryan*, 293 U. S. 388, 415;

Schechter v. *U. S.*, 295 U. S. 495, 537.

POINT V.

The statutes as construed and applied, are discriminatory, arbitrary and oppressive class legislation, violative of the constitutional provision for equal protection, and constitute bills of attainder.

When New York physicians, convicted of federal felonies that are not felonies in New York, are brought up in disciplinary proceedings, they receive the benefit of the legislative definition in Section 6514(1) limiting "felonies" to those defined as such by the New York law. They also receive the benefit of the traditional policy of New York not to add additional domestic punishment for conviction of foreign offenses. The Court of Appeals here however, ruled that the word "crime" (which is held to include felonies as well as misdemeanors) in subdivision 2b of the same section, is to receive a different interpretation when applied to a New York physician convicted of what is deemed a federal misdemeanor, that is no offense in New York, and the physician will not receive the benefit of the mentioned policy. Section 6514(2b) with its meaning so fixed, thus becomes discriminatory, oppressive class legislation, arbitrarily and unjustly discriminating against physicians convicted of the lesser offense. It permits physicians, lawyers and engineers, convicted of federal felonies involving moral turpitude, to receive the benefit of the definition and the policy mentioned, while it deprives Appellant, convicted of a lesser offense, devoid even of moral turpitude, of the guarantee of equal protection. There is no basis in justice, in reason, or in relationship to the medical practice, for such discrimination. There is no real or substantial relation of any such discrimination, to the public health, safety, morals or to any other phase of the general welfare. In fact as the dissent pointed out, "the argument is far stronger for limiting the term 'crime' than for limiting the term 'felony'" (R. 74).

Further, to permit attorneys to have the benefits of the procedure mentioned in *Matter of Donegan,* 265 App. Div. 774, aff'd 294 N. Y. 704; also 282 N. Y. 285; where the New York supervisory body for attorneys was authorized to investigate the question of foreign conviction and actually found the attorney innocent despite a federal court and jury verdict of guilty and an affirmance thereof, and to deny that procedure to physicians, is again indicative of the discriminatory nature of this legislation, with its meaning so fixed, and is again indicative of the lack of equal protection.

To grant physicians full hearings in connection with all other subdivisions of Section 6514, but not in connection with subdivision 2b; to hold that the foreign conviction automatically establishes the "professional fault" so that the evidence "could not change the admitted fact of their conviction" (R. 65) even though it is uncontradicted that the criminal trial was limited to constitutional issues; to hold that all men are free to test the constitutionality of legislative acts upon payment of the penalty for the test except physicians, who in addition risk the suspension or revocation of their licenses and the loss of their life's work; to hold that the dismissal of the "listing" complaint and the affirmance thereof in the U. S. Court of Appeals may be adduced in evidence, but that the reversal by this Court may be disregarded, all point up the discriminatory, oppressive nature of this class legislation and the denial of the equal protection principle.

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered * * * with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373-4.

"Class legislation discriminating against some and favoring others, is prohibited * * *." *Barbier* v. *Connolly,* 113 U. S. 27, 32.

"Unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge." *Garner* v. *Los Angeles Board,* 341 U. S. 716, 725.

"The Constitution * * * precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goessart* v. *Cleary,* 335 U. S. 464, 466.

"No reasonable basis for such a discrimination is suggested and none is perceived. This means that as so applied it is invalid, notwithstanding its validity in some different applications." *Concordia* v. *Illinois,* 292 U. S. 535, 545.

Particularly because of the listing of the organization, *subsequent* to Appellant's conviction, the reference to the listing in the hearing before the Regents, the reference to the dismissal and to the affirmance of the dismissal of the organization's complaint against that listing, the disregard of the later reversal by this Court, the change in the temper of the times, and the utter lack of even an attempt to controvert Appellant's testimony, the Appellant must conclude that the Regents have employed the statutes involved as a bill of attainder. "The Constitution deals with substance not shadows." *Cummings* v. *Missouri,* 4 Wall. 277, 325.

Because of a change in the political climate from that of hostility to the Spanish regime and a favoring of the organization, to a later hostility to the organization and a favoring of the Spanish regime, there is reason to believe the statutes were used as a bill of attainder "to impose pains and penalties for past lawful associations * * *." *Wieman* v. *Updegraff,* 344 U. S. 183.

Because the Court of Appeals held that the evidence was rightfully disregarded and the foreign conviction itself was deemed a "professional fault," the Regents employed the statutes as a bill of attainder "to inflict punishment without a judicial trial * * *," *Cummings* v. *Missouri,* 4 Wall. 277, 323. *Garner* v. *Los Angeles,* 341 U. S. 716, 722. The statutes became a bill of attainder in the hands of the Regents be-

cause the Regents, with complete legal immunity, "determines the sufficiency of the proof adduced whether conformable to the evidence or not; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense." *Cummings* v. *Missouri*, 4 Wall. 277, 323. The unprecedented, discriminatory action taken by the Regents and their disregard of the report of their own Committee on Discipline, point up the plain fact that their "power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution." *Ex Parte Garland*, 4 Wall. 333, 379, and not to protect the public of New York against an incompetent surgeon.

POINT VI.

The statutes as construed violate the precept that a state may not impose penalties for acts occurring in Washington, D. C., where the United States has exclusive jurisdiction and exclusive power of legislation, especially where it is apparent that there is no substantial relationship between the act complained of and the medical practice.

The alleged contempt and conviction both occurred in Washington, D. C., where the United States has exclusive power of legislation and exclusive jurisdiction, and where the United States did legislate in Title 2 U. S. C. Section 192.

The statutes here which were construed so as to impose penalties for conduct in Washington, D. C., that was unconnected with the medical practice, are invalid, because "a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States," and because "the State undertakes to go beyond its jurisdiction into territory where the United States has exclusive control." *Western Union* v. *Brown*, 234 U. S. 542, 547.

"It is of the highest public importance that the jurisdiction of the State should be resisted at the borders of those places

where the power of exclusive legislation is vested in Congress by the Constitution. * * * If it is desirable that penalties should be inflicted for a default * * * occurring within the jurisdiction of the United States, Congress only has the power to establish them." *Western Union* v. *Chiles,* 214 U. S. 274, 278.

This principle becomes doubly important here where the default in the production of the books was deemed an offense only in Washington, D. C., and where there was no relationship between the omission complained of and the regulation of medical practice in the interests of the citizenry of New York.

POINT VII.

The statutes as applied disregard Title 18 U. S. C. Section 402, a law of the United States, and thus violate Article VI of the Constitution.

The indictment against Appellant was for "Contempt of the House of Representatives Committee" (S.M. p. 126). The Attorney General of New York stated that the conviction was for "contempt of Congress" (S.M. p. 459). The word "crime" is not mentioned in the indictment or judgment of conviction (S.M. p. 130). Title 18 U. S. C., defines "Crimes" against the United States. Section 402 thereof is headed: "Contempts constituting Crimes." The contempt of which Appellant was convicted is not mentioned there at all. At the bottom of that section the following appears: "all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." Thus, the contempt at bar is not even designated as a federal "crime". Although it is a contempt that may be "punished" according to the "prevailing usages at law," it is not listed as a federal crime and therefore the requirement of Section 6514(2b) that there be a "conviction of a crime," is missing.

The Regents failed to discharge the burden of proving the alleged contempt was a crime, by failing to resolve the doubt

to say the least, that Section 402 of Title 18 throws upon the existence of a "crime" at bar. To disregard Title 18 U. S. C., Section 402, is to disregard a law of the United States.

Further, Title 2 U. S. C., Section 192, under which Appellant was convicted, states that such a contempt "shall be deemed" a misdemeanor but since said contempt was excluded from the section on "Contempts constituting Crimes," and since such a contempt is merely "deemed" a misdemeanor for purposes of "punishment" (Title 18 U. S. C., Sec. 402), the word "deemed" must be accorded its natural meaning in its proper context as a "deeming" merely for purposes of "punishment". "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed that thing." *The Queen* v. *County Council of Norfolk*, 60 L. J. Q. B. (N. S.) 379, 381-2.

Although this contempt is treated for purposes of punishment as though it were a misdemeanor, it is not a "crime" because it nowhere appears in Title 18 U. S. C., Section 402, or in the indictment, as a "crime". It is one thing to make a contempt a crime as in Title 18, Section 402. Such contempts become "crimes". It is a different thing to treat a default, for the purpose of punishment, with the same effect as though it were a crime. Things equal in effect, are not identical. A heart attack and a bullet can kill; they have that effect; nevertheless they are not the same. The New York Penal Law itself, in Section 22, speaks of acts that are either "criminal or punishable."

Although the effect is the same, the failure to designate this contempt as a federal crime means that it is not a crime especially in proceedings such as these where statutes "must be strictly construed" in favor of the Appellant because they are "penal" in nature. *Matter of Donegan*, 282 N. Y. 285. In addition, there is the distinction between a "crime" and a "misdemeanor" adverted to in Point I.

POINT VIII.

The statutes as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and thus violate, Article I, Section 7 of the Constitution.

There is no crime under the laws of the United States unless that crime is defined by an "Act" or a "Statute" of Congress. "One may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an Act of Congress." *Donnelly* v. *U. S.*, 276 U. S. 505, 511. "We agree that the courts * * * in determining what constitutes an offense against the United States, must resort to the statutes of the United States enacted in pursuance of the Constitution." *Re Kollock*, 165 U. S. 526, 533. *U. S.* v. *Eaton*, 144 U. S. 677, 687-8.

The Constitution treats an "Act" of Congress as different from a "Joint Resolution." An "Act" reads: "Be it 'enacted' by the Senate and House" (Title 1 U. S. C., Secs. 21, 101). A "Joint Resolution" reads: "Be it resolved by the Senate and House" (Title 1 U. S. C., Secs. 22, 102). There are basic historical and legal differences resulting in a differentiation that is plainly crystallized in the Constitution (Art. I, Sec. 7 clauses 2 and 3; Art. III; Art. VI). "Law Making in the U. S." by Dr. Harvey Walker—1934 ed. p. 317.

Only "Laws" that are "enacted" as such are made part of the law of the land. Art. I, Sec. 7; Art. VI. Joint Resolutions, even though they go through the same preliminary processes, merely "take effect"; Art. I, Sec. 7; they are not included as part of the law of the land. They are used for miscellaneous matters such as extending an invitation to Lafayette to visit the United States (Dec. 6, 1824; 18th Congress, 2nd session House Journal p. 8), or to welcome Kossuth (Dec. 15, 1851; 32nd Cong. 1st session, House Journal p. 89), or to give notice of the abrogation of a treaty (April 20, 1846, 29th Cong.; House Journal pp. 695, 697).

The offense of which Appellant was convicted, embodied in Title 2 U. S. C., Section 192, is not mentioned in an "Act" of Congress but in a "Joint Resolution." 52 Statutes 942. The offense of which Appellant was convicted is therefore not a crime under an "Act" of Congress or under a "statute" of the United States. The resolution merely "took effect." Art. I, Sec. 7. "A Joint Resolution * * * has the effect of law." *Watts* v. *U. S.*, 161 F. 2d 511; c.d. 68 S. Ct. 81. Thus, a "contempt constituting a crime" (Title 18, U. S. C., Sec. 402), and this contempt, are equal in effect only. Again, things equal in effect only, are not identical. Appellant was convicted not of a federal crime but of what was "deemed for purposes of punishment" and treated in "effect" as though it were an offense.

When this very Joint Resolution was passed, there was asked from the floor of Congress: "is it within the power and jurisdiction of the House to amend the statutory law of the United States in the form of a joint resolution and not in the form of a bill?" The answer in part was: "Strictly speaking, proposed laws should be introduced and all changes in law made through the introduction of bills. Personally I would like to see this joint resolution feature abandoned, except where it involves something which is not really fundamental law." Congressional Record, Vol. 83, p. 8171, Part 7, 75th Congress, 3rd Session.

The difference between a joint resolution, which merely expresses the sense or the will of the Congress, and a bill or Act of Congress, which becomes part of the law of the land, was pointed up in a recent discussion of a joint resolution, in the U. S. Senate on July 15, 1953, in connection with requiring certain markings on exported merchandise. Senator Potter stated:

> "Frankly, I would prefer legislation requiring such marking as a mandatory provision. However, it was the sense of the committee that it would be wise merely to express the sense of Congress."

Senator Bush asked:

> "I ask the Senator from Michigan if it might not be a good idea to have the concurrent resolution passed over, so that legislation might be prepared which would enforce the use of our markings on everything exported from this country."
>
> * * * * *
>
> "Mr. Potter * * * I am sure that mandatory legislation requiring such markings would be much stronger than a mere expression of Congress. If I thought there could be passed legislation * * * I am sure it would be stronger than a mere expression of the will of Congress." (Congressional Record, 83rd Con. 1st Sess.; Vol. 99, No. 131, July 15, 1953, pp. 9133-4.)

The Regents claimed the foregoing contention was "unpersuasive". But the burden of being persuasive rested upon the Regents who have never attempted to explain away Title 18 U. S. C., Section 402, or the constitutional differentiation between a Law and a Joint Resolution.

Since the burden rested upon the Regents to prove that Appellant had been convicted of a crime, since crimes can only be created by Acts of Congress and not by Joint Resolutions, and since the statutes "must be strictly construed," the Regents failed to discharge the burden resting upon them.

To ignore the plain differentiation mentioned in the Constitution between a Law and a Joint Resolution, is to disregard Article I, Section 7.

CONCLUSION.

The judgment of the Court below should be reversed.

Respectfully submitted,

ABRAHAM FISHBEIN,
Attorney for Appellant.

APPENDIX.

New York State Education Law.

Section 6514. Revocation of certificates; annulment of registrations.

1. Whenever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony, as defined in section sixty five hundred two of this article, the registration of the person so convicted may be annulled and his license revoked by the department. It shall be the duty of the clerk of the court wherein such conviction takes places to transmit a certificate of such conviction to the department. Upon reversal of such judgment by a court having jurisdiction, the department, upon receipt of a certified copy of such judgment or order of reversal, shall vacate its order of revocation or annulment.

2. The license or registration of a practitioner of medicine may be revoked, suspended or annulled or such practitioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

(a) That a physician is guilty of fraud or deceit in the practice of medicine or in his admission to the practice of medicine; or

(b) That a physician has been convicted in a court of competent jurisdiction, either within or without this state, of a crime; or

(c) That a physician is an habitual drunkard, or is or has been addicted to the use of morphine, cocaine or other drugs having similar effect, or has become insane; or

(d) That a physician offered, undertook or agreed to cure or treat disease by a secret method, procedure, treatment or medicine or that he can treat, operate and prescribe for any

human condition by a method, means or procedure which he refuses to divulge upon demand to the committee on grievances; or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio, or magazines; or

(e) That a physician did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion or to procure the performance of the same by another or to violate section eleven hundred and forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.

(f) That a physician has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including x-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, x-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equipment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment. Nothing contained in this chapter shall prohibit physicians from practicing medicine as partners nor in groups nor from pooling fees and

monies received, either by the partnerships or groups or by the individual members thereof, for professional services furnished by any individual physician, member, or employee of such partnerships or groups, nor shall the physicians constituting the partnerships or groups be prohibited from sharing, dividing or apportioning the fees and monies received by them or by the partnership or group in accordance with a partnership or other agreement; provided that a certificate of doing business under an assumed name shall have been filed pursuant to section four hundred forty or four hundred forty-b of the penal law, and provided further that no such practice as partners or in groups or pooling of fees or monies received or sharing, division or apportionment of fees shall be permitted with respect to medical care and treatment under the workmen's compensation law except as expressly authorized by the workmen's compensation law. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2, at page 292.)

Section 6515. Procedure in disciplinary proceedings.

1. The committee on grievances shall be continued. Such committee shall consist of ten members who shall be appointed by the regents. The term of office of each of such members of such committee shall be five years. The terms of office of two members shall expire each year. In the case of vacancy at any time by resignation, death or otherwise in the membership of the committee, such vacancy shall be filled for the unexpired term in the same manner as provided for in the original selection of such member.

2. Any duly incorporated state medical or osteopathic society having two hundred or more members may nominate candidates for memebers of such committee, not to exceed three nominations for each member of such committee to which such society shall be entitled hereunder. When the candidates are so nominated the regents shall appoint for the terms specified herein as they shall determine, such

members of such committee, so that such committee shall consist of four members who have been duly nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopathic Society, and the regents upon their own nomination shall appoint three members of conspicuous professional standing. Each member of such committee shall be a duly licensed physician of this state.

3. The members of such committee shall serve without compensation and shall annually, within ten days after the first day of January of each year, organize by the election of a chairman and a secretary.

4. The members of such committee shall have jurisdiction to hear all charges against duly licensed physicians, osteopaths and physiotherapists of this state for violation of the provisions of section sixty-five hundred fourteen hereof, except subdivision one, and upon such hearing such committee shall determine such charges upon their merits, and the department may, after due notice and hearing, upon the receipt from such committee of the record, findings and determination of such committee wherein and whereby such practitioner has been found guilty, revoke and annul his license, annul his registration, suspend him from practice, or reprimand or otherwise discipline him. Proceedings against any practitioner under this section shall be begun by filing a written charge or charges against the accused. Such charges may be preferred by any person, corporation or public officer, and they shall be filed with the secretary of the committee on grievances and such secretary shall forward to the executive officer of the department a copy of such charges in all cases in which such committee or a subcommittee thereof shall deem a trial necessary. The chairman of such committee, when charges are preferred, may designate three or more of the members of such committee, including, whenever possible, at least one member

ho represents the same school of practice as the physician, steopath or physiotherapist, against whom the charges are referred to hear and report upon such charges to such ommittee. The time and place of the hearing of such harges shall be fixed by the secretary of the committee as oon as convenient and a copy of the charges, together with notice of the time and place when they will be heard shall e served upon the accused or his counsel at least ten days efore the date actually fixed for such hearing. Where personal service or service upon counsel after due diligence annot be effected and such fact is certified on oath by any erson duly authorized to make legal service, the secretary f the committee shall cause to be published for four times t least thirty days prior to the hearing, a notice of the earing in a newspaper published in the county in which he physician, osteopath or physiotherapist was last known o practice, and a copy of such notice shall also be mailed o the accused at his last known address. All such notices f hearing of charges shall contain a plain and concise tatement of the material facts without unnecessary repetiion, but not the evidence by which the charges are to be roved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses and evidence upon his own behalf, to cross-examine such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the committee. Such subcommittee to whom such charges were referred shall make a written report of findings and recommendations and the same shall be forthwith transmitted to the secretary of the committee on grievances, with a transcript of the evidence. Said grievance committee may thereupon act upon such recommendation as it shall deem fit, or may take further testimony if the same shall seem desirable in the interest of justice. Thereupon the committee shall determine such

charges upon their merits (the vote of each member of such committee to be recorded as part of the committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them, the committee shall transmit to the department the record, findings and determination wherein and whereby such practitioner has been found guilty, and their recommendation, and the regents after due hearing shall in their discretion execute an order accepting or modifying such determination of the committee as hereinabove provided. If the practitioner is found not guilty, the committee shall order a dismissal of the charges, and the exoneration of the accused.

Nothing herein contained shall estop the department from initiating proceedings in any case.

5. Any licensed practitioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight of the civil practice act for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or enjoined except upon application to such appellate division, after notice to the attorney-general. The committee on grievances or any member thereof may issue subpoenas and administer oaths pursuant to section sixty-one of the public officers law in connection with any hearing or investigation under this article and it shall be the duty of such committee to issue subpoenas at the request of and upon behalf of the defense. The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain the same. The department shall furnish legal advice and assistance to the committee whenever such service is requested.

6. Any controversy between two or more physicians, osteopaths or physiotherapists, or between one or more physicians, osteopaths or physiotherapists and another person, which such parties to such controversy agree to submit to arbitration, may be submitted in writing to the committee on grievances, which may in its discretion, act as arbitrator in such controversy, and the decision of the committee upon such arbitration shall be final, and where the same orders the payment of a sum of money, the same may be docketed as a judgment of a court of record and enforced as such judgment, provided the terms of the arbitration include such provision.

7. The regents may remove any member of such committee from office who shall have been found guilty, after due hearing, of malfeasance in office or neglect of duty.

8. No member of the committee shall participate in any way in the hearing or determination of any charges in which he may be either a witness as to facts or an accused, nor in any case where the parties, complainant or accused, are related to him by consanguinity or affinity within the sixth degree. The degree shall be ascertained by ascending from the member of the committee to the common ancestor and descending to the party, counting a degree for each person in both lines, including the member of the committee and the party and excluding the common ancestor.

9. Should, for any reason, three or more members of the committee be disqualified from participating in the hearing and decision of any case, or be for other reasons unable to participate therein their places may be temporarily filled for the purpose of determining the case to be heard by the remaining members of the committee nominating twice the number of candidates for such vacancy from whom there shall be selected by the chairman of the committee, after notice to the respective parties, the necessary number of members to constitute a quorum. A quorum of the committee shall consist of six members.

10. Such committee shall have power to make such rules and regulations for the conduct of its business as it shall deem necessary, provided such rules and regulations do not conflict with any of the provisions of this article.

11. The committee shall have power, where a proceeding has been dismissed, either on the merits or otherwise, to relieve the accused from any possible odium that may attach by reason of the making of charges against him, by such public exoneration as it shall see fit to make if requested by the accused so to do. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2 at page 298.)

Supreme Court of the United States

OCTOBER TERM 1953 — No. 69.

DR. EDWARD K. BARSKY,
Appellant,
—against—
THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK.

Reply Brief for Appellant.

Appellee's brief fails to controvert Appellant's arguments or authorities. Appellee lists eight points corresponding to Appellant's, and makes assertions thereunder that are supportive neither by reason nor authority; that do not even purport to come to grips with Appellant's contentions; that are erroneous in fact and law. Appellant adverts to some of those errors:

1. On page 2, Appellee claims: "The first mention of any constitutional question" was made in Appellant's brief "before the Appellate Division." On the contrary, Appellant presented the constitutional questions at his first opportunity, in his answer to the charges (R. 4-6). Since the Attorney General of New York, the Medical Committee on Grievances and the Committee on Discipline insisted that they would not hear argument on unconstitutionality and that such claims were for the courts only, Appellant stated on page 20 of his brief to the Committee on Discipline: "The defenses of unconstitutionality, set up in the third and fourth affirmative

defenses, need not be repeated here. * * * Should this Board indicate a desire to go into that issue, we will submit a separate memorandum on the point." Appellant's answer to the charges became the basis of his petition to the Appellate Division; the defenses of unconstitutionality were repeated there (R. 14, VI. c). The Court of Appeals certified that constitutional questions were presented and passed upon. This Court noted probable jurisdiction.

On page 3, Appellee seeks to convey the impression that Judge Fuld "mentions" the constitutional questions casually in one short final paragraph. On the contrary, the dissenting opinion indicates clearly that the constitutional issues were uppermost in Judge Fuld's mind; they are alluded to repeatedly and vigorously throughout his opinion (R. 69-80).

2. The statement on page 3 that the disciplinary statutes as to doctors, lawyers, and dentists, are "substantially alike," is erroneous. As far as the pertinent issues are concerned, they are significantly dissimilar. For example, Appellee states that under the three statutes, "Revocation is mandatory" if a licensee "is convicted of a felony." This appears to be true only of the statutes involving lawyers and dentists. As Appellee's table on page 13 shows, upon conviction of a felony the attorney "*shall*" cease to be an attorney, and the dentist "*shall*" forfeit his license, but as to physicians the statute states that upon such a conviction his license "*may*" be annulled. Again contrary to Appellee's assertion, a hearing would appear to be necessary even though a physician were convicted of a felony. There are other pertinent differences, apparent from the same table: the dentists' statute specifically provides that the felonies mentioned include federal felonies; these provisions are omitted from the statutes governing doctors and lawyers. The lawyers' statute permits discipline upon conviction of a "crime *or* misdemeanor." The statutes involving doctors and dentists permit discipline upon conviction only of a crime but omit mention of misdemeanors, thus pointing up the difference alluded to on pages 36-7 of Appellant's original brief.

3. Appellee admits on page 3 that "'Felony' is somewhat limited in meaning" for purposes of discipline against a physician, but nowhere does Appellee attempt to justify the conflict between the limited meaning attributed to "felony" in subdivision 1 and the unprecedented and expanded meaning attributed to "crime" in subdivision (2b), nor does Appellee even purport to deny or justify the irrational, unjust and discriminatory results adverted to in Point I of Appellant's brief.

4. On page 4, Appellee attempts to distinguish between "crime" in subdivision 2b, and "felony" in subdivision 1. This is an apparent recognition of the contradiction mentioned, but Appellee's claim that "crime" in subdivision 2b does not include "felony" in subdivision 1, is negated by the holding of the Court below that "crime" includes felonies as well as misdemeanors (R. 66). The result is that "felony" admittedly has a restricted meaning in subdivision 1, but "crime", which includes felonies and misdemeanors, has an expanded meaning in subdivision 2b, with all the conflicts, irrational discriminations, and unjustifiable results detailed in Appellant's brief.

5. On page 4, Appellee urges: "For all three professions conviction of a 'crime' includes convictions by courts outside the State," disregarding the fact that the dentists' statute specifically mentions and includes federal crimes but the doctors' and lawyers' statutes are restricted to those acts that are also made crimes in New York. Having erroneously attempted to equate the three statutes, Appellee claims in its second note on page 4, that the five cases there mentioned, sanctioned disbarment following federal convictions for offenses that have no counterpart in New York. The five cases involve lawyers, not doctors. None of those cases was in the Court of Appeals, the court of last resort. All the citations on the subject, in Point I of Appellant's brief, were Court of Appeals' citations specifically holding that convictions of

a doctor, lawyer or engineer in a federal court or in another state, will not result in disqualification in New York unless the offense on which the conviction was predicated has a counterpart in New York. Actually in Appellee's last cited case, *Matter of Hiss*, 276 App. Div. 701, the Court specifically pointed out that the perjury of which the attorney had been convicted was also a felony in New York. In *Matter of Butcher*, 269 App. Div. 545, the point was raised that the federal felony of which the attorney was convicted was not a crime in New York, and accordingly, the attorney was disbarred not by reason of the conviction but on a "charge of misconduct." It must be noted that "professional misconduct," which has long been a ground for disbarment, was not made a ground for revocation of a physician's license until 1953 (McKinney's Consolidated Laws of New York, Book 16, Part 3, Section 6514-2g, p. 130, footnote as to subdivision 2g). In Appellee's other three cases, not only was moral turpitude involved, but apparently no claim was made that the federal offense was or was not an offense in New York, nor can we tell whether the disbarment was upheld solely by reason of the conviction, or because of the "professional misconduct" clause which is part of the same Section 90(2) of the N. Y. Judiciary Law governing lawyers, as is the "conviction of a crime or misdemeanor" clause.

6. On page 5, Appellee cites five cases in this Court involving a claim of vagueness. In the first, *Mahler* v. *Eby*, 264 U. S. 32 (1924), it appears that the Court indicated it would refuse to apply the vagueness doctrine to a deportation statute pertaining to "undesirable" aliens, on the theory that deportation "is not a punishment" (p. 32). This view would appear to be superseded by the more recent view that deportation is a penalty and that the vagueness doctrine applies. *Jordan* v. *DeGeorge*, 341 U. S. 223, 231 (1951). We fail to perceive how the other four cases shed any light on the unlimited term "crime" at bar. It is submitted that the holding below that the "crimes" for which physicians may be

disciplined are those entrusted to "the good sense and judgment of our Board of Regents," reveals "a catchall enactment left at large by the State court which applied it." *Beauharnais* v. *Illinois*, 343 U. S. 250, 253.

7. In Point 2 on page 6, Appellee appears to make the first, direct concession that reasonable relationship to the practice of medicine, is requisite. Appellee urges this relationship, on the theory that (a) "a bad citizen" should be disqualified, (b) because of "the discredit he can bring upon his fellow practitioners." Appellee has never claimed, much less attempted to prove, that Appellant was "a bad citizen" or that he engendered "discredit". Further, there is neither statutory nor other authority for such claim, nor did the Court below or the Regents, promulgate any such "standards". Still further, the test is not "discredit to his fellow practitioners," but substantial relationship to the "public health, safety, morals or some other phase of the general welfare." *Liggett* v. *Baldridge*, 278 U. S. 105, 111-3. Appellee might well find it impossible to define "a bad citizen" and the "discredit" phrase with sufficient certainty and delimitation to warrant suspension or revocation.

It is again significant that Appellee has failed to answer the arguments advanced in the dissenting opinion and in Appellant's brief to the effect that under the ruling below, a conviction of a physician for a traffic misdemeanor or for a violation of the segregation laws or for other acts "even meritorious" in New York, would be sufficient for revocation or suspension. Appellee is silent with respect to any attempt to justify this holding or result, either in reason, precedent or in relationship to the medical practice.

Appellee cites *Raab* v. *State Medical Board*, 156 Ohio St. 158. The fact that certiorari was denied does not mean that this Court passed upon the merits. Further, the Ohio statute plainly differs from the New York statute. In New York, subdivision 1 of Section 6514 specifically restricts felonies for which suspension or revocation will lie, to those that are also

made felonies by the laws of New York. There is no such statute in Ohio. The Court there construed the statute to include federal felonies. There is no evidence that the decision was in conflict with other holdings of the same court, as at bar. Appellee does not deny that all the Court of Appeals' cases mentioned in Appellant's Point I, hold that revocation or suspension of the licenses of a physician, lawyer or engineer, will not lie for conviction of a federal felony unless that felony is also made a felony under New York law. Nor does Appellee deny that the Court of Appeals also holds that a commutation agreement providing that the convict must serve out his sentence if convicted of a "felony either in New York State, *or any other state,*" was *not* breached by a federal conviction of a felony that was *not* a felony in New York. Nor has Appellee attempted to justify the irrational, discriminatory and unjust results that flow from according this interpretation and policy to doctors, lawyers or engineers convicted of federal or extra-territorial felonies involving moral turpitude, and in denying that interpretation and policy to physicians convicted of a *lesser* offense, that does *not* involve moral turpitude, in connection with an act that is *not* made a crime in New York, and that was, as the Regents' Committee on Discipline stated, the "*only* method * * * and the *traditional* method" of testing constitutionality (R. 57-58). The *Raab* case does not involve the undefined term "crime".

8. The statement on page 8 that the hearing before the Medical Grievance Committee was basically "oratory to persuade that Dr. Barsky was a humanitarian being persecuted for the breadth of his sympathies, or on the other hand that he was a dangerous subversive" is a prejudicial misstatement, without attempt at supporting reference. There was no "oratory" nor is any claimed in the reports of the Medical Grievance Committee and the Committee on Discipline, or in the opinions of the courts below. There was a motion to dismiss founded on claimed lack of jurisdiction. Upon denial, Appellant adduced oral testimony, documented in every

detail, to show the workings of the organization and his motives before the House Committee, all of which the Committee on Discipline reviewed carefully and held "were *not* material in the criminal trial" but "*are* material here" (R. 53). There was not an iota of contradictory proof; the report of the Committee on Discipline and the dissenting opinion both so indicate beyond dispute (R. 79-80). The majority opinion mentions no factual dispute.

Further, there was not the shadow of a claim by the Regents or by anyone else in the hearing, briefs or arguments before the Appellee or the courts below, that Appellant was a "subversive" or "a dangerous subversive."

The deliberate, unwarranted introduction of "dangerous subversion," is, we suggest, a plea to passion and prejudice, to hide the absence of moral justification and as a substitute for the lack of need for protection of the general welfare, evident from the inception of this matter. The evidence and finding as to the "listing", the spirit evident in the matter criticized here, and the stratagem adverted to in item 10 below, should, we submit, leave small doubt as to the motivation behind the charges and the proceedings: passion and prejudice—not protection.

9. The quotation from the report of the Medical Committee on Grievances, on page 9 of Appellee's brief, is significant. Appellant was not permitted to introduce the proof there mentioned, in his criminal trial, because, as the Committee on Discipline noted, it was not material there (R. 53). He did produce that evidence and proof in his hearing before the Regents. Although the Committee on Discipline later held this evidence and proof were material in that hearing, the Medical Grievance Committee (whose determination and recommendation were accepted by the Regents), stated, as indicated on page 9, that this evidence was not material, and that they would not be concerned with it. Appellant was

convicted in the criminal trial, and he was found guilty in the hearing before the Medical Grievance Committee. In other words, he was to be damned if he did not produce the evidence, and he was to be damned if he did produce the evidence.

10. It is regrettable that Appellee on page 9 found it necessary to resort to mention of the fact that Mr. Robert M. Benjamin, chairman of the Committee on Discipline, presented the appeal of Alger Hiss. We shall not belabor this hardly subtle artifice. It is of the pattern criticized in item 8. The Court of Appeals itself referred to Mr. Benjamin's work on administrative law (R. 68-9).

11. On page 10, Appellee, aware of and not disputing the "gross and prejudicial error" involved in the "listing" which was included in the report of the Medical Grievance Committee, essays the distinction that the Regents, in accepting the recommendation of that Committee, did not confirm its findings. The record states that the Regents not only adopted the recommendation but "accepted and sustained" the "determination" (R. 59-60) which was predicated on and is contained in and included under the "findings"; to claim otherwise is to claim there was no separate heading "Determination" and therefore the report failed to comply with the statute (R. 30; Sec. 6515(4)). The recommendation was plainly based upon the findings and determination. No such "distinction" as Appellee urges now, was ever claimed by Appellee or acknowledged by the courts below. The attempted distinction is hardly realistic enough to warrant acceptance in a suspension proceeding.

Conclusion.

A point-by-point comparison of both briefs will indicate that Appellee's brief is significantly silent on all the basic arguments and on all the authorities contained in Appellant's brief.

The judgment of the Court below should be reversed.

Respectfully submitted,

ABRAHAM FISHBEIN,
Attorney for Appellant.